Bill Review Letters - 2013

An Analysis of Selected Bill Review Letters of the Attorney General of Maryland on Legislation Passed at the 2013 Session of the General Assembly



DEPARTMENT OF LEGISLATIVE SERVICES 2013

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of the
Attorney General of Maryland
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Department of Legislative Services
Office of Policy Analysis
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Foreword

At the conclusion of each session of the General Assembly, the Attorney General's office undertakes a thorough review of all legislation passed during the session and advises the Governor as to the legislation's legality and constitutionality. While most of the bills that are scrutinized pass constitutional muster without comment, the Attorney General's office frequently prepares letters that raise constitutional, legal, and technical issues that it believes warrant attention or action. In extreme cases, the Attorney General may suggest a gubernatorial veto of a bill or recommend that a provision of a bill that is constitutionally impermissible be severed from the bill. More typically, the Attorney General's concerns relate to technical matters that can be addressed in the annual curative and corrective bills prepared by the Department of Legislative Services for introduction in the next session.

The purpose of this document, *Bill Review Letters – 2013*, is two-fold. First, it is to acknowledge the Attorney General's bill review process as a valuable source of information for the department's use in preparing the annual curative and corrective bills and fulfilling its ongoing responsibility to maintain the accuracy and integrity of the Annotated Code and the laws of Maryland. Second, the document is intended to assist those directly engaged in legislative drafting for the General Assembly. The letters selected for inclusion in this publication discuss various issues relating to constitutional law, statutory construction, and other legal matters to consider in the drafting, review, and analysis of bills and amendments. Finally, the analysis of each letter includes a segment on drafting tips that should be considered carefully by legislative drafters. For purposes of summarization, citations to the cases relied on by the Attorney General are generally omitted.

Bill Review Letters – 2013 contains selected bill review letters that cover a wide range of topics including due process, equal protection, Second Amendment rights, separation of powers, delegation of legislative authority, and a variety of miscellaneous legislative issues. Note that several of these topics and other important constitutional and legal considerations related to legislation and legislative drafting are discussed in more depth in the department's *Maryland Legislative Desk Reference*.

This document was prepared by the Department of Legislative Services, Office of Policy Analysis. The analyses included in this document were written by April M. Morton, Benjamin Blank, Tiffany J. Johnson, George H. Butler Jr., and Patrick D. Carlson. Michelle J. Purcell prepared the document for publication. John J. Joyce edited the analyses and supervised production of the document. The Office of Policy Analysis is grateful to Kelly Keyser of the Office of the Attorney General, Counsel to the General Assembly, for her assistance in providing the letters discussed in this document.

U.S. Constitutional Issues

SECOND AMENDMENT – FIREARM SAFETY ACT OF 2013

Bill/Chapter: Senate Bill 281/Chapter 427 of 2013

Title: Firearm Safety Act of 2013

Attorney General's Letter: April 30, 2013

Issue: Whether a bill that puts certain restrictions on owning, carrying, and possessing certain firearms and certain firearm ammunition violates the Second Amendment to the U.S. Constitution.

Synopsis: Senate Bill 281/Chapter 427 of 2013 is a comprehensive gun control/gun reform bill which does the following, among other things:

- bans certain assault weapons and reduces the capacity limit for detachable magazines;
- bans the use of armor-piercing bullets in the commission of a crime of violence;
- institutes a "handgun qualification license" process which requires an applicant to take a certain class and submit fingerprints to the Secretary of State Police;
- adds additional restrictions on access to firearms for people with documented mental illnesses and intellectual disabilities;
- alters the requirements and responsibilities of wear and carry permittees;
- expands the circumstances under which a person can be disqualified from owning a firearm; and
- adds additional provisions relating to firearm accountability, hunting, and firearm dealers.

Discussion: Before analyzing each of the items listed in the synopsis, the Attorney General discussed the Second Amendment to the U.S. Constitution in light of the 2008 Supreme Court decision in *District of Columbia v. Heller* (*Heller*). The Attorney General noted that in *Heller* the court found that the Second Amendment codified a pre-existing "individual right to possess and carry weapons in case of confrontation." This right, however,

is not a "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."

The Attorney General pointed out that analyzing gun regulations must be done with the standards of review that courts have adopted to implement the *Heller* decision. The United States Court of Appeals for the Fourth Circuit has adopted a two-pronged approach to analyze firearms laws under the Second Amendment (*Heller II*). First, one must analyze if the law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee. If the answer is "no," the law is valid. If the answer is "yes," then the government is required to show that the law is reasonably adapted to a substantial government interest.

It is under this framework that the Attorney General discussed the various components of Senate Bill 281.

Assault Weapons and High-capacity Detachable Magazines Ban: Heller holds that for a class of firearms to be protected under the Second Amendment, the class (1) must be in common use, (2) cannot be dangerous or unusual, and (3) must have a nexus to core self-defense needs. The Attorney General concluded that an assault weapon does not fit the *Heller* standard for protection under the Second Amendment because an assault weapon is relatively uncommon, dangerous and unusual, and is largely unrelated to home self-defense.

As for high-capacity detachable magazines, the Attorney General noted that the issue of whether a detachable magazine is afforded the same protections as a firearm under the Second Amendment is an issue of first impression. Using the same test as with assault weapons, the Attorney General concluded that even though a high-capacity magazine could not be called unusual, it could be classified as dangerous due to its capacity to inflict harm. Additionally, the magazine in and of itself cannot be seen as having a nexus to home defense.

Armor-piercing Bullets: As with high-capacity detachable magazines, the Attorney General concluded that it is not clear if bullets and accessories are afforded the same protections as firearms under the Second Amendment. The Attorney General pointed out, however, that since Senate Bill 281 only makes it a crime to use or possess armor-piercing bullets "during and in relation to the commission of a crime of violence," the law will not be applied to law-abiding citizens; therefore, the criminalization of the use of armor-piercing bullets is constitutional.

Handgun Qualification License: In order to analyze the many issues surrounding handgun qualification licenses, the Attorney General divided

them into two main categories: licensure requirements and license fees. Within the category of licensure requirements, the Attorney General analyzed the issue under three different schemas: (1) the presumptively lawful analysis, (2) the longstanding regulation analysis, and (3) the strict/intermediate scrutiny analysis.

In *Heller*, the Supreme Court made a list of regulatory measures that are presumptively lawful, including laws imposing conditions and qualifications on the commercial sale of firearms. Based on this holding, the Attorney General concluded that a provision relating to the manner in which a person applies to purchase a firearm would be presumptively lawful.

In *Heller II*, the Fourth Circuit held that longstanding registration laws should be presumed constitutional. Based on this holding, the Attorney General reasoned that the handgun qualification license requirements are both basic and longstanding. Prior to Senate Bill 281, there were requirements an applicant had to meet before receiving a firearm. The changes to these requirements may be deemed "administrative" as a way to improve compliance. As for fingerprinting specifically, the Attorney General observed that the requirement to submit fingerprints is merely a better method of identifying an applicant's eligibility to obtain a firearm. In any case, the Attorney General concluded that, even if some or all the requirements to obtain a handgun qualification license are determined to be outside the "presumptively lawful" category of regulations identified in *Heller*, they would still be constitutional under the compelling government interest in protecting citizens and reducing crimes.

In regard to licensing fees, the Attorney General noted that the Supreme Court has held that fees imposed to defray a state's administrative expenses in policing a constitutionally protected activity are constitutionally acceptable. The Attorney General reasoned that the new licensing fees are not revenue taxes intended to inhibit the exercise of a constitutional right, but are administrative fees intended to cover expenses incident to administration of the law.

Mental Health Provisions: Prior to Senate Bill 281, in Maryland a person could be prohibited from possessing a firearm if the person had a mental disorder diagnosis or a history of violent behavior. Senate Bill 281 establishes broader standards for disqualification from firearm rights for reasons of mental health and intellectual disabilities as well as a new process for restoring those rights. The Attorney General concluded that the mental health provisions qualify as a longstanding prohibition on the possession of firearms by the mentally ill and that the new provisions are just newer versions of old laws.

Wear and Carry Permits: Senate Bill 281 made two changes to wear and carry permit law. First, wearing or carrying a handgun inconsistent with the permit is now a crime and, second, a new 16-hour training program for new permittees is required. The Attorney General noted that the Fourth Circuit recently affirmed the constitutionality of Maryland's wear and carry permit law and concluded that the changes made by Senate Bill 281 would not change the court's analysis of the law or the result of that analysis.

Lost and Stolen Guns: Senate Bill 281 requires a gun owner to report a lost or stolen gun within 72 hours of realizing the gun is missing. The Attorney General concluded that it would be a "great stretch" to say that the Second Amendment protects a person's silence in the face of public danger associated with a firearm that the person no longer possesses.

Dealer Provisions: The Attorney General concluded that allowing the Secretary of State Police to suspend the license of a dealer for not complying with certain recordkeeping requirements is constitutional since the new dealer provisions are merely supplementary to current federal requirements.

Drafting Tips: **Although the U.S. Supreme Court has affirmed an individual right to possess and carry weapons in case of confrontation, this right is not unlimited. If drafting legislation that imposes a burden on conduct that potentially impacts this individual right, the drafter should work with the sponsor to make sure that the State's interest in regulating the firearm or activity is substantial and the restriction is reasonably adapted to accomplish this purpose.**

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 30, 2013

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Re: Senate Bill 281, The "Firearm Safety Act of 2013"

Dear Governor O'Malley:

We have reviewed and hereby approve Senate Bill 281, the "Firearm Safety Act of 2013" for your signature. As you know, attorneys from the Office of the Attorney General have worked with your office and the bill's sponsors throughout the legislative process to ensure that the components of this bill would be constitutional and legally defensible. We write today to explain those conclusions.

I. The Second Amendment Framework

The Second Amendment to the U.S. Constitution provides that, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." In 2008, the U.S. Supreme Court held that "the [District of Columbia's] ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). The *Heller* Court explained that the Second Amendment codifies a pre-existing "individual right to possess and carry weapons in case of confrontation." *Id. at* 591. But the *Heller* Court pointed out that "the right secured by the Second Amendment is not ... a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose," and that, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Id.* at 626 (describing historical limitations on firearms rights). Indeed, the *Heller* Court went so far as to identify a number of restrictions on keeping, carrying, and selling weapons as "presumptively lawful regulatory measures," including "laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27 & n.26. The Court made clear that this and other

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presumptively lawful measures were only "examples; our list does not purport to be exhaustive." *Id.* at n.26.

The Court of Appeals for the Fourth Circuit has adopted a two-pronged approach to analyzing laws under the Second Amendment. *Woollard v. Gallagher*, ____ F.3d ____, ____, 2013 U.S. App. LEXIS 5617, *23, (4th Cir. Mar. 21, 2013); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010). Under this approach, the first question is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *Chester*, 628 F.3d at 680 (internal quotation marks omitted). If not, the challenged law is valid. *Id.* If, on the other hand, the burdened conduct is found to be within the scope of the Amendment, then the second prong requires the application of "an appropriate form of means-end scrutiny." *Id.*[1] The Fourth Circuit—like nearly every other federal court to have considered the question—has adopted intermediate scrutiny as the appropriate test for regulation affecting behavior outside the core of in-home self-defense by law-abiding citizens. *United States v. Masciandaro*, 638 F.3d 458, 471 (4th Cir. 2011). Under that test, the government bears the burden of demonstrating that the challenged regulation "is reasonably adapted to a substantial government interest." *Id.*; *see also Chester*, 628 F.3d at 683 (under intermediate scrutiny, "the government must demonstrate ... that there is a 'reasonable fit' between the challenged regulation and a 'substantial' government objective").[2]

Many opponents of this bill expressed their belief that there is a constitutional right to individual firearm possession that is exempt from regulation. That belief, however, is not supported by either the *Heller* decision itself, which is clear that there are important limitations on the exercise of the Second Amendment right, *Heller*, 554 U.S. at

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[1] Because the *Heller* Court did not provide much detail about the scope of the Second Amendment (other than to identify the "core" of the Second Amendment right as law-abiding citizens' possession and use of guns in their homes for self-defense), courts have frequently "deemed it prudent to ... resolve post-*Heller* challenges to firearm prohibitions at the second step." *Woollard*, 2013 U.S. App. LEXIS 5617, *24.

[2] Although the Fourth Circuit has adopted intermediate scrutiny as the appropriate test for this means-end analysis, *Masciandaro*, 638 F.3d at 471, the Office of the Attorney General continues to believe that a "reasonable regulation" standard, derived from pre-*Heller* state constitutional analyses, is the more appropriate standard of review and has preserved that issue in *Woollard* for possible review by the U.S. Supreme Court. *Woollard*, 2013 U.S. App. LEXIS 5617, *34 n.8. Our analysis of Senate Bill 281 under the currently prevailing intermediate scrutiny standard is not a waiver or abandonment of this position.

626-27, or by comparison to other important constitutional rights which are often regulated without constitutional violation. *See, e.g., Crawford v. Marion County Election Board*, 553 U.S. 181, 200-02 (2008) (affirming use of voter identification law to regulate participation in election); *Rosario v. Rockefeller*, 410 U.S. 752, 754-58 (1973) (upholding state voter registration requirements); *Perry Educ. Ass'n. v. Perry Local Educ. Ass'n.*, 460 U.S. 37, 44-46 (1983) (upholding time, place, and manner restrictions on free speech). Instead, proposed gun regulations must be analyzed under the standards of review that courts have developed to implement the *Heller* decision.

II. Assault Weapon and High-Capacity Detachable Magazine Bans

The specific holding in *Heller* concerned handguns, which the Court determined were constitutionally protected, in part, because they are "the most popular weapon chosen by Americans for self-defense in the home." *Heller*, 554 U.S. at 629. Conversely, the *Heller* Court explained that the Second Amendment "does *not* protect those weapons *not* typically possessed by law-abiding citizens for lawful purposes." *Id.* at 624-25 (emphasis added) (discussing *U.S. v. Miller*, 307 U.S. 174 (1939)). The *Heller* Court suggested three factors to consider in determining if a class of firearms is protected by the Second Amendment:

- It must be "in common use at the time," *id.* at 627;
- It cannot be a "dangerous or unusual" class of weapons, *id.*; and
- There must be a nexus to core self-defense needs. *Id.* at 599.

See also U.S. v. Pruess, 703 F.3d 242, 246 n.2 (4th Cir. 2012).

In analyzing the assault weapons and high-capacity detachable magazine bans in Senate Bill 281, we first look to see if, considering these three factors, they are protected by the Second Amendment. Although we determine that neither assault weapons nor high-capacity detachable magazines are protected by the Second Amendment, we nonetheless will also determine if the State has sufficiently justified the proposed bans so as to satisfy intermediate scrutiny.

A. Assault Weapons Ban

Senate Bill 281 expands the longstanding (and never challenged) assault pistol ban to apply to a list of newly prohibited assault long guns, Maryland Public Safety ("PS")

Ann. Code, § 5-101(r)(2), and "copycat weapons" as defined in proposed Maryland Criminal Law ("CL") Ann. Code, § 4-301(e). In our view, the banned assault weapons satisfy none of the three factors suggested by the *Heller* Court in that: (1) they are relatively uncommon;[3] (2) they are dangerous and unusual; and (3) they are largely unrelated to home self-defense, at least as that term is commonly understood. In fact, language in *Heller* itself strongly suggests that the Supreme Court understands that military-style assault weapons are outside of the protections of the Second Amendment:

> It may be objected that if weapons that are most useful in military service—M-16 rifles and the like[4]—may be banned, then the *Second Amendment* right is completely detached from the prefatory clause. But as we have said, the conception of the militia at the time of the *Second Amendment*'s ratification was the body of all citizens capable of military service, who would bring the sorts of lawful weapons that they possessed at home to militia duty. It may well be true today that a militia, to be as effective as militias in the 18th century, would require sophisticated arms that are highly unusual in society at large. Indeed, it may be true that no amount of small arms could be useful against modern-day bombers and tanks. But the fact that modern developments have limited the degree of fit between the

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[3] It is apparently difficult to estimate the number of assault weapons in private hands in the United States. In a 2012 report concerning gun ownership, the Congressional Research Service noted that the most recent estimate, from 1994, was 1.5 million assault weapons. William J. Krouse, *Gun Control Legislation* (Congressional Research Service, Nov. 14, 2012) at 9 & n.38. In that same year, 1994, an estimated 192 million firearms were privately owned in the United States, of which 65 million were handguns, 70 million were rifles, and 49 million were shotguns. Phillip J. Cook & Jens Ludwig, *Guns in America: National Survey on Private Ownership and Use of Firearms* (National Institute of Justice, May 1997). Thus in 1994, assault weapons accounted for less than 1% of the total firearms owned. Even assuming a significant undercount, differences based on definitions of assault weapons, and accounting for the age of the data, this figure is still just a tiny fraction of the total number of firearms in the United States. Accordingly, assault weapons, as opposed to the handguns at issue in *Heller*, are not "overwhelmingly chosen," "the most preferred firearm in the nation," or "the most popular weapon chosen by Americans." *Heller*, 554 U.S. at 628-29. Therefore, we think it is fair to say that assault weapons are not in common use, at least as the *Heller* Court intended the term.

[4] The M-16 rifle is, for purposes of this analysis, essentially the military version of the AR-15, an assault weapon specifically banned by Senate Bill 281. *See Heller v. District of Columbia*, 670 F.3d 1244, 1263 (D.C. Cir. 2011) ("*Heller II*") (discussing similarities between M-16 and AR-15).

> prefatory clause and the protected right cannot change our interpretation of the right.

Heller, 554 U.S. at 627-28. Thus, the Supreme Court assumed—and apparently considered the proposition to be so unassailable as to require no explanation—that military-style assault weapons are outside of the protection of the Second Amendment and may be banned. *See People v. James*, 94 Cal. Rptr. 3d 576, 586 (Cal. Ct. App. 2009) (relying on the above-quoted passage from *Heller* to determine that assault weapons are not protected by the Second Amendment). This should conclude the inquiry.

Moreover, even if assault weapons are within the scope of the Second Amendment's protection, there is more than sufficient evidence to support a "substantial relationship or reasonable 'fit' between, on the one hand, the prohibition on assault weapons ... and, on the other, [the State's] important interests in protecting police officers and controlling crime." *Heller v. District of Columbia*, 670 F.3d 1244, 1262 (D.C. Cir. 2011) ("*Heller II*") (affirming constitutionality of District of Columbia's ban on assault weapons); *see also Wilson v. County of Cook*, 968 N.E.2d 641 (Ill. 2012) (remanding case for development of record regarding whether assault weapons are within the scope of the Second Amendment and County's justification for ban). Here, in Maryland, the Legislature considered significant evidence of the lethality of assault weapons and their lack of utility as a common method of self-defense before adopting Senate Bill 281. For example, the standing committees of the General Assembly with jurisdiction to consider Senate Bill 281 (the Senate Judicial Proceedings Committee and, operating jointly, the House Judiciary and the Health and Governmental Operations Committees) received testimony that design features of assault weapons contribute to their lethality and that "the greater the ammunition capacity of the firearm used in a mass shooting, the more victims were injured or killed by gunfire."[5] There was also testimony about the dangers that assault weapons present to law enforcement.[6] Moreover, the

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[5] Testimony of Daniel W. Webster, Professor, Johns Hopkins Bloomberg School of Public Health and Director of the Johns Hopkins Center for Gun Policy and Research, at 5 (hereinafter, "Webster Testimony") (and sources cited therein).

[6] Baltimore County Police Chief James W. Johnson presented oral testimony to the General Assembly that mirrored his recent congressional testimony in support of a federal assault weapons ban. *See Testimony for Chief Jim Johnson, Baltimore County, Maryland Chair, National Law Enforcement Partnership to Prevent Gun Violence to the U.S. Senate Judiciary Committee* (Jan. 30, 2013) *available at* http://www.judiciary.senate.gov/pdf/1-30-13JohnsonTestimony.pdf.

General Assembly also relied on social science research that supported assault weapons bans in other jurisdictions. *See, e.g., Heller II*, 670 F.3d at 1262-63 (discussing social science literature supporting D.C.'s assault weapon ban); Christopher S. Koper, *America's Experience with the Federal Assault Weapons Ban,* in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis 167 (2013) (discussing federal assault weapons ban); Christopher S. Koper & Jeffrey A. Roth, *The Impact of the 1994 Federal Assault Weapons Ban on Gun Violence Outcomes: An Assessment of Multiple Outcome Measures and Some Lessons for Policy Evaluation*, 17 J. of Qualitative Criminology 33 (2001) (same). Therefore, it is our judgment that even if a reviewing court were to find that assault weapons were within the scope of the Second Amendment—a finding unsupported by *any* reported decision—it would still find that the ban is constitutional.

B. High-Capacity Detachable Magazine Ban

Senate Bill 281 defines a detachable magazine as "an ammunition feeding device that can be removed readily from a firearm without requiring disassembly of the firearm action or without the use of a tool, including a bullet or a cartridge." Proposed CL § 4-301(f). The bill then states that a person "may not manufacture, sell, offer for sale, purchase, receive, or transfer a detachable magazine that has a capacity of more than 10 rounds of ammunition for a firearm." Proposed CL § 4-305(b). The effect is a ban in the State of Maryland (with exceptions for law enforcement) on detachable magazines holding more than 10 rounds: what we will call high-capacity detachable magazines.

As an initial matter, it is far from clear that a detachable magazine of any size, simply because it is used and associated with firearms, would be protected by the Second Amendment and subjected to the same constitutional analysis as an actual firearm. If such magazines are not protected, there would be no constitutional concern about the ban at all. For the sake of argument, however, we will analyze the constitutionality of a ban on high-capacity detachable magazines as though it is subject to the same analysis.

Applying the three factors suggested by *Heller* to determine whether a given weapon or class of weapons is within the scope of the Second Amendment produces a mixed result when applied to these high-capacity detachable magazines. We would be hard pressed to argue that high-capacity detachable magazines are not in common use today. In fact, many handguns in common use are currently sold with magazines that will

be banned under Senate Bill 281.[7] It is clear that these magazines' ability to increase the amount of bullets fired in a short period renders them more "dangerous"[8] than other bullet loading systems, but it is unclear whether they could be classified as "unusual."[9] And it would seem unlikely that high-capacity detachable magazines have a nexus to standard home self-defense. *See* Webster Testimony, *supra* note 5 at 5 (citing Arthur L. Kellerman, *et al., Weapon Involvement in Home Invasion Crimes*, 273 J. Am. Med. Assoc. 1759 (1995)). Thus, applying the *Heller* factors, although we believe high-capacity detachable magazines to be outside of the Second Amendment's scope,[10] this presents an issue of first impression about which there is little guidance from the courts. That, however, is not dispositive of the constitutional analysis.

Even if we assume, *arguendo*, that high-capacity detachable magazines are entitled to protection under the Second Amendment, *see supra* note 1, we nonetheless conclude that a complete ban will survive constitutional scrutiny. That is because we are confident that a reviewing court will find that there is a substantial relationship between the prohibition of high-capacity detachable magazines and the State's objectives of controlling crime and protecting law enforcement officers. *See Heller II*, 670 F.3d at 1262-64 (affirming constitutionality of District of Columbia's ban on high-capacity detachable magazines); *Woollard*, 2013 U.S. App. LEXIS 5617, *31 (Given the extent of gun violence in Maryland, "we can easily appreciate Maryland's impetus to enact

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[7] For example, a standard Glock pistol now comes equipped with two detachable seventeen-round magazines.

[8] All firearms are, by definition and design, "dangerous." Thus necessarily, the *Heller* Court must have meant something different or beyond the customary meaning of the term.

[9] We do not believe that the *Heller* Court intended to leave the determination of constitutionality to the caprice of gun manufacturers as they increase magazine capacity in an attempt to obtain larger market shares. Thus, we think that there must be a more specialized meaning to the terms "dangerous," *see supra* note 8, and "unusual" as used in *Heller* that will be elucidated in further developments in the case law.

[10] We note in this regard that Professor Laurence H. Tribe, the Carl M. Loeb University Professor and Professor of Constitutional Law at Harvard Law School, and author of a leading treatise on the U.S. Constitution, testified before the U.S. Senate Judiciary Committee that, in his view, high-capacity detachable magazines are outside the scope of the Second Amendment and can be regulated without triggering heightened scrutiny. Laurence H. Tribe, *Prepared Testimony: Proposals to Reduce Gun Violence: Protecting Our Communities While Respecting the Second Amendment* (Feb. 12, 2013).

measures aimed at protecting public safety and preventing crime, and we readily conclude that such objectives are substantial governmental interests"). There is significant social science, much of which is part of the legislative record, to support this "substantial relationship."[11] The Legislature was also aware of recent mass shootings in which the perpetrators were armed with high-capacity detachable magazines and that some of these incidents were interrupted only when the shooter paused to reload. Thus, we believe that the ban on high-capacity detachable magazines will satisfy intermediate scrutiny and be found to be constitutional.

III. Armor Piercing Bullets

Senate Bill 281 creates a new crime for those who use "restricted firearm ammunition" in the commission of a crime of violence. Proposed CL § 4-110(a)(2). Ammunition manufactured from the materials listed in proposed CL § 4-110(a)(2) are harder, have more penetrating power, and are, therefore, capable of piercing armored vehicles and body armor. For this reason, such ammunition is commonly referred to as "armor-piercing" bullets or "cop-killer" bullets. Manufacture and sale of armor-piercing bullets for civilian use has been prohibited by federal law since 1986. 18 U.S.C. § 922(a)(7), (8); *Kodak v. Holder*, 907 Fed. Appx. 907 (4th Cir. 2009) (unpublished opinion affirming constitutionality of federal prohibition on armor-piercing bullets). Under Senate Bill 281, it will be a separate crime to possess or use these bullets "during and in relation to the commission of a crime of violence." Proposed CL § 4-110(b). We do not foresee any constitutional obstacle to this provision. First, there is no clear guidance that specific types of bullets are to be afforded the same constitutional protection as guns themselves. Even if they are, the Fourth Circuit Court of Appeals has been clear that "a presumptively lawful regulation could not violate the Second Amendment unless, as applied, it proscribed conduct 'fall[ing] within the category of ... *law-abiding responsible* citizens ... us[ing] arms in defense of hearth and home.'" *U.S. v. Pruess*, 703 F.3d 242, 245 (4th Cir. 2012) (emphasis in original) (quoting *U.S. v. Moore*, 666 F.3d 313, 319 (4th Cir. 2012)). Here, where the crime of use or possession of this "restricted firearm ammunition" can only occur "during and in relation to the commission of a crime of violence" there is no danger that it will be applied to law-abiding responsible citizens. Therefore, the proposed criminalization of the use of these bullets is constitutional.

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[11] Social science evidence supporting the ban on high-capacity detachable magazines was substantially similar to that regarding the assault weapon ban described above.

IV. Handgun Qualification License

A. Licensure Requirements

Under the terms of Senate Bill 281, to be eligible to purchase, rent, or receive a handgun, one must possess a Handgun Qualification License issued by the Department of State Police or be specifically exempted from that requirement. To obtain a Handgun Qualification License, an applicant must:

(1) be at least 21 years old;

(2) be a Maryland resident;

(3) have taken an approved firearms safety course (or be exempted from that requirement); and

(4) not be prohibited by federal or state law from owning or possessing a firearm.

Proposed PS § 5-117.1(d). To verify that an applicant is not prohibited from owning or possessing a firearm, the applicant must submit fingerprints. The State Police then run a criminal history records check. Proposed PS § 5-117.1(f). A Handgun Qualification License is valid for 10 years and may be renewed. Proposed PS § 5-117.1(i). The fees for obtaining and renewing the Handgun Qualification License are discussed in the next section of this letter.

1. "Presumptively Lawful" Analysis

Applying the Fourth Circuit's two-part analysis to the Handgun Qualification License provisions of Senate Bill 281 requires us to turn back to the *Heller* decision. There, the Supreme Court provided a list of some "presumptively lawful regulatory measures":

> Nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Heller, 554 U.S. at 626-27 & n.26. The Court did not specify whether it meant that these "presumptively lawful" regulations were simply outside of the scope of the Second Amendment or whether such laws are within the scope of the Second Amendment but are nevertheless constitutional because they satisfy any applicable level of scrutiny. *Masciandaro*, 638 F.3d at 472-73 (describing but not resolving this "ambiguity" in the *Heller* opinion). In either case, however, we must take *Heller* at its word and, therefore, it is our view that a law like Senate Bill 281, which "impos[es] conditions and qualifications on the commercial sale of arms" is "presumptively lawful" under the Second Amendment. *Heller*, 554 U.S. at 626-27 & n.26; *see also Justice v. Town of Cicero*, 577 F.3d 768, 773-74 (7th Cir. 2009) (affirming constitutionality of town handgun registration scheme). Moreover, as the *Heller* Court was careful to make clear, this list of "presumptively lawful" regulations is illustrative only and not exhaustive. *Id.* n.26. We think, therefore, that it is reasonable to infer that imposing identical "conditions and qualifications" on non-commercial transactions of regulated firearms as are imposed on commercial sales will also be "presumptively lawful." The commercial nature of the transaction should not be relevant to the constitutional analysis. Thus, it is our view that, under the law applied in this Circuit, the Handgun Qualification License provisions of Senate Bill 281 are presumptively constitutional and no further means-end analysis will be required.

We note that a ban on possession of protected arms cloaked in the disguise of a law imposing conditions or qualifications on the sale of arms would presumably not be upheld under *Heller*. Senate Bill 281, however, does no such thing. In fact, Senate Bill 281's licensing requirement does not prohibit anyone who is otherwise lawfully allowed to own a handgun from complying with the straightforward requirements and obtaining a license. Moreover, the requirements themselves are clearly related to Maryland's interest in public safety and preventing crime.

2. "Longstanding Regulation" Analysis

The only extended judicial analysis of a handgun regulatory regime like that contemplated by Senate Bill 281 takes a slightly different analytical approach than we have suggested. In *Heller II*, the D.C. Circuit considered the constitutionality of a handgun registration regime that was enacted in the wake of the Supreme Court's original *Heller* decision. *Id.* at 1247. The D.C. Circuit read the above-quoted paragraph from *Heller* as if the modifier "longstanding" applied to each of the three examples. Thus, according to the D.C. Circuit, only "longstanding" registration laws should be entitled to the presumption of constitutionality. *Id.* at 1253. The D.C. Circuit then found that some "basic" aspects of a registration system had long existed (albeit in other parts of the

country) and were thus valid. *Id.* at 1253-55. The D.C. Circuit found other parts of D.C.'s registration scheme to be "novel," *i.e.* not "longstanding," and therefore a potential burden on Second Amendment rights. *Id.* at 1255-56. The D.C. Circuit then remanded those "novel" aspects of the registration system to the District Court to determine whether they satisfied the intermediate scrutiny test. *Id.* at 1258-60.

Applying this *Heller II* test to Senate Bill 281, it is our view that the Handgun Qualification License provisions of the bill are both "basic" and "longstanding." In fact, we view those licensure requirements as merely an administrative means to improve compliance with existing Maryland laws regarding the qualifications of firearms purchasers. *See* PS § 5-117 (requiring a firearm application for purchase, rental, or transfer of a regulated firearm)); PS § 5-118(b)(3)(i) (requiring a purchaser to be at least 21 years old); PS § 5-118(b)(3)(ii), (iii) (prohibiting transfer to persons disqualified by state law); PS § 5-118(3)(x) (requiring completion of a firearms safety training course). For example, the requirement to submit fingerprints, proposed PS § 5-117.1(f)(3)(i), is simply a better, more accurate way of identifying an applicant for purposes of determining eligibility to obtain firearms. Moreover, Maryland law has long required fingerprint registration of presumably law-abiding citizens in dozens of contexts to prevent ineligible people from participating in activities or employment.[12] And finally, a requirement to submit fingerprints as a part of a firearms registration or owner licensure process is a longstanding feature of state laws in New Jersey,[13] New York,[14]

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[12] The list is long and includes, among other professions, employees of childcare facilities, Md. Fam. Law Ann. Code, §5-562; bank incorporators, executive officers, and directors, Md. Fin. Inst. ("FI") Ann. Code, §3-203.1; credit union incorporators and directors, FI §6-309; mortgage lenders and originators, FI §11-506.1; check cashing services licensees, FI §12-107; certain county and city taxicab drivers, CP §§10-236.2 through 10-236.3; private detectives, Md. Bus. Occ. & Profs. ("BO") Ann. Code, §13-304; security systems technicians, BO §18-303; security guards and security agencies, BO §19-304; horse racers, BO §11-312; second hand precious metal object dealers and pawnbrokers, BO §12-204; locksmiths, Md. Bus. Reg. ("BR") Ann. Code, §12.5-204; local government employees and volunteers in many counties, Md. Crim. Proc. ("CP") Ann. Code, §§10-231 through 10-236.1; and debt management service providers, FI §12-909.

[13] N.J. Stat. Ann., § 2C:58-3(e) (fingerprinting required to obtain permit to purchase firearms since at least 1991).

[14] N.Y. Penal Law, § 400.00(4) (requirement of fingerprinting for permit to carry or possess firearms since 1963).

Massachusetts,[15] Connecticut,[16] Hawaii,[17] and the District of Columbia.[18] Thus, the only new requirement under Senate Bill 281 to obtain a Handgun Qualification License—as opposed to an improved method of implementing existing law—is the requirement of Maryland residency. This requirement, however, is still simply a "basic" registration requirement and despite being new here, is of "longstanding" vintage in other states including New York. *Osterweil v. Bartlett*, 819 F. Supp. 2d 72 (N.D.NY 2011) (upholding the requirement of New York residency for New York gun licensing).[19] The *Heller II* Court was clear that such basic registration requirements are "self-evidently de minimis, for they are similar to other common registration or licensing schemes, such as those for voting or for driving a car, that cannot be reasonably considered onerous." *Heller II*, 670 F.3d at 1255. Thus, under even the *Heller II* test, it is our view that the provisions requiring a Handgun Qualification License are all presumptively constitutional.

3. Strict/Intermediate Scrutiny Analysis

Finally, even if a reviewing court disagrees about all of the foregoing, and some or all of the requirements to obtain a Handgun Qualification License are determined to be outside of the "presumptively lawful" category of regulations identified by the Supreme Court in *Heller*, they would still be constitutional if they satisfy the appropriate level of

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[15] Mass. Gen. Laws, ch. 140, § 129B (2) (fingerprinting required for Firearm Identification Card since 1998); § 131(e) (fingerprinting required for license to carry firearm since 1957, expanded to also require fingerprints for possession of a firearm in 1998).

[16] Conn. Gen. Stat. § 53-202d (a)(4) (thumbprint of owner required for certificate of possession for assault weapon since 1993).

[17] Haw. Rev. Stat. Ann., § 134-2(b) (fingerprints required for permit to acquire firearms; requirement since 1988).

[18] D.C. Code Ann. § 7-2502.04(a) (requiring fingerprinting for registration since 2009); D.C. Mun. Reg. § 24-2312.1 (same). We note that the D.C. Circuit in *Heller II* determined fingerprinting to be a "novel" registration requirement and has, apparently, enjoined its use. *Heller II*, 670 F.3d at 1255. Even if the court was correct in labeling this as novel, a point with which we do not agree, *see supra* notes 13-17, that finding has not been fatal to the requirement. Rather, the D.C. Circuit remanded the matter back to the trial court to take evidence regarding whether the fingerprint registration requirement satisfies intermediate scrutiny. *Id.* at 1258-60.

[19] Federal law also imposes the equivalent of residency requirements by prohibiting interstate transfers except through licensed dealers. 18 U.S.C. § 922(a)(3).

constitutional scrutiny. In light of the *de minimus* impact of these requirements on the constitutional right, it is not clear that a court would analyze them using heightened scrutiny at all. If a court did employ heightened scrutiny, the appropriate test under current Fourth Circuit law, *see supra* n.2, would be no greater than intermediate scrutiny, which is to say, the requirements will be found to be constitutional if it can be shown that they are "reasonably adapted to a substantial government interest." *Masciandaro*, 638 F.3d at 471 (adopting intermediate scrutiny); *Heller II*, 670 F.3d at 1256-58 (applying intermediate scrutiny to D.C.'s handgun registration scheme). If a court were to find that the licensure requirement substantially burdens core Second Amendment conduct—lawful self-defense of home and hearth with a handgun—it could apply strict scrutiny analysis, in which the State would be required to show that the restriction is necessary to achieve a compelling governmental interest. *See, e.g., Citizens United v. F.E.C.*, 558 U.S. 310, 130 S. Ct. 876, 898 (2010). We believe, however, that the State would be able to satisfy any level of scrutiny. There can be no doubt of the compelling governmental interest in protecting its citizens and police and reducing crime. *Woollard*, 2013 U.S. App. LEXIS 5617, *32. Moreover, there was substantial evidence presented at the committee hearing regarding this bill (and its House counterpart, House Bill 294) demonstrating the relationship between firearms licensing and crime prevention. The principal witness on this relationship was Dr. Daniel W. Webster. *See supra* n.4. Dr. Webster described his very substantial research on the topic, *see e.g.*, Daniel W. Webster, *et al., Preventing the Diversion of Guns to Criminals through Effective Firearms Sales Laws,* in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis (2013) (describing the substantial increase in "crime guns originating in Missouri as a result of Missouri's repeal of "permit to purchase" licensing and that such laws were associated with significantly lower rates of diverting guns to criminals across state lines); Daniel W. Webster, *et al., Effects of State-Level Firearm Seller Accountability Policies on Firearms Trafficking*, 86 J. Urban Health 525 (2009); Daniel W. Webster, *et al, Relationship Between Licensing, Registration, and other Gun Sales Laws and the Source State of Crime Guns*, 7 Injury Prevention 184 (2001), and that of others. *See, e.g.,* Garen J. Wintemute, *et al., Risk Factors among Handgun Retailers for Frequent and Disproportionate Sales of Guns Used in Violent and Firearm Related Crimes*, 11 INJURY PREVENTION 357 (2005); U.S. General Accounting Office, *Firearms Purchased from Federal Firearm Licensees Using Bogus Identification* (2001). This social science "fit" evidence went unrebutted at the lengthy committee hearings. Thus, we are confident that a reviewing court will find more than sufficient evidence supports a finding that the requirement of a Handgun Qualification License is constitutional.

B. License Fees

An applicant for a Handgun Qualification License must pay three administrative fees:

(1) "the fee ... for access to Maryland criminal history records," proposed PS § 5-117.1(f)(3)(ii);

(2) "the mandatory processing fee required by the Federal Bureau of Investigation for a national criminal history records check," proposed PS § 5-117.1(f)(3)(iii); and

(3) "a nonrefundable application fee to cover the costs to administer the program of up to $50." Proposed PS § 5-117.1(g)(2).

The U.S. Supreme Court has yet to address the extent to which the government may impose a fee on an individual who is exercising a Second Amendment right. Several lower federal courts, however, have upheld fees associated with the regulation of firearms. In *Justice v. Town of Cicero*, the U.S. District Court for the Northern District of Illinois rejected an argument that "a fee requirement is inherently invalid." 827 F. Supp. 2d 835, 842 (N.D. Ill. 2011). The court in *Justice* upheld the fee because it found "no indication" that the fee was imposed for "any other purpose" than to defray costs associated with licensing. *Id.* Likewise in *Kwong v. Bloomberg*, the U.S. District Court for the Southern District of New York upheld a $340 license fee for handgun registration. 876 F. Supp. 2d 246 (S.D.N.Y. 2012). The court in *Kwong* first determined that New York City submitted sufficient evidence that the fee in question defrayed the City's administrative costs. *Id.* at 258. The court relied on case law indicating that fees may "be imposed to cover the costs of a regulatory scheme designed to combat potentially harmful effects of the constitutionally protected activity." *Id.* at 256. The court also alternatively upheld the fee if analyzed under immediate scrutiny. *Id.* at 259. The court determined that the $340 fee supported the City's important and substantial interests "to promote public safety and prevent gun violence." *Id.* Accordingly, the court found that "[t]he $340 application fee is substantially related to these important governmental interests because the fee is designed to recover the costs attendant to the licensing scheme." *Id. See also Heller II*, 670 F.3d 1244, 1255 (D.C. Cir. 2011) ("basic registration requirements [which include a $60 registration fee] are self-evidently de minimis, for they are similar to other

common registration or licensing schemes, such as those for voting or for driving a car, that cannot reasonably be considered onerous").[20]

During debate on Senate Bill 281, an argument was advanced, based on dicta from *Murdoch v. Pennsylvania*, that "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution." 319 U.S. 105, 113 (1943). From this statement, the bill's opponents argued that *any* fee for handgun registration is necessarily unconstitutional. Even in *Murdoch*, however, this quotation does not mean what is claimed for it. In *Murdoch*, the ordinance in question required religious groups to pay a license fee of $1.50 a day to distribute literature—an activity clearly protected by the First Amendment. *Murdoch*, 319 U.S. at 113. The Supreme Court invalidated the fee because it found it to be a "flat tax" and "not a nominal fee imposed as a regulatory measure to defray the expense of policing the activities in question." *Id.* at 113-14. Thus, even in *Murdoch*, the Court was willing to allow a fee calibrated to defray the State's administrative expenses in policing a constitutionally-protected activity. By contrast, two years earlier, the Supreme Court upheld a $300-a-day parade fee. *Cox v. New Hampshire*, 312 U.S. 569 (1941). As the United States Court of Appeals for the Fourth Circuit later explained,

> In upholding the [parade fee] statute, the Supreme Court [in *Cox*] affirmed the principle that fees that serve not as revenue taxes, but rather as means to "meet the expense incident to the administration of the act and to the maintenance of public order in the matter licensed," do not violate the Constitution.

Center for Auto Safety v. Athey, 37 F.3d 139, 144-45 (4th Cir. 1994) (quoting *Cox*, 312 U.S. at 577). Thus, it is our opinion that a court reviewing the fees associated with applying for a Handgun Qualification License, tied as they are to the administrative costs, will see these fees for what they are: constitutional administrative fees, not a "revenue tax" intended to raise money or inhibit the exercise of a constitutional right.

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[20] We also note that there is a challenge pending in the U.S. District Court for the Eastern District of California to California's fees on the purchase and transfer of firearms. *Bauer v. Harris*, No. 11-01440 (E.D. Calif.). The allegations of that complaint are that the California fees are "excessive," not that no fees may be charged at all.

V. Mental Health Provisions

Among other bases for disqualification, current Maryland law prohibits possession of a regulated firearm (which is defined to include handguns and specific assault weapons) by a person who:

> suffers from a mental disorder as defined in § 10-101(f)(2) of the Health – General Article[21] *and* has a history of violent behavior against the person or another, unless the person has a physician's certificate that the person is capable of possessing a regulated firearm without undue danger to the person or to another; [or]
>
> has been confined for more than 30 consecutive days to a facility as defined in § 10-101 of the Health - General Article,[22] unless the person has a physician's certificate that the person is capable of possessing a regulated firearm without undue danger to the person or to another.

PS § 5-133(b)(6), (7) (emphasis added). Thus, under current Maryland law, a person may be prohibited from possessing a regulated firearm by either the combination of a mental disorder diagnosis and a history of violent behavior (PS § 5-133(b)(6)), or by hospitalization in a mental health facility for more than 30 consecutive days (PS § 5-133(b)(7)). In either case, the prohibition may be lifted by obtaining an appropriate physician's certification. A denial of relief may be challenged under the State's Administrative Procedure Act. Md. State Gov't ("SG") Ann. Code, § 10-201 *et seq.*

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[21] Section 10-101(f)(2) of the Health-General Article states: "'Mental disorder' includes a mental illness that so substantially impairs the mental or emotional functioning of an individual as to make care or treatment necessary or advisable for the welfare of the individual or for the safety of the person or property of another." Although current law and Senate Bill 281 both refer to "mental disorder as defined in § 10-101(f)(2)," that subprovision merely describes what the definition of mental disorder "includes," and the probable intent is to refer to the entire definition of mental disorder set forth in § 10-101(f).

[22] "Except as otherwise provided in this title, 'facility' means any public or private clinic, hospital, or other institution that provides or purports to provide treatment or other services for individuals who have mental disorders. 'Facility' does not include a Veterans' Administration hospital." HG § 10-101(e)(1), (2).

At the time the provisions for mental health disqualification were enacted in the 1970s, there was no doubt as to their constitutionality and consistency with federal law. More recent developments, however, require further analysis to determine whether that continues to be so.

As described above, the Supreme Court in *Heller* provided a list of some "presumptively lawful regulatory measures," that are not in doubt, including "longstanding prohibitions on the possession of firearms by ... the mentally ill." *Heller*, 554 U.S. at 626-27 & n.26. We read this as a strong suggestion that there is no constitutional prohibition on a state prohibiting firearm ownership and possession by people with mental illness, particularly when there is a procedure to obtain relief from such prohibitions. *Tyler v. Holder*, ____ F. Supp. 2d ____, 2013 U.S. Dist. LEXIS 11511 (W.D. Mich. Jan. 29, 2013); *see also United States v. Spring*, 886 F. Supp. 2d 37 (D. Me. 2012) (requiring the possibility of a restoration process). Even assuming *arguendo* and contrary to the above-quoted language in *Heller* that due process rights attach to the disqualification and restoration process, it is our view that the current Maryland law continues to satisfy constitutional standards.[23]

Congress has also offered incentives to the states to bring their laws regarding gun possession by people with mental illness into conformity with a national standard. Particularly relevant for present purposes is the NICS Improvement Amendments Act of 2007 (the "NIAA"), 122 Stat. 2559. (NICS is the National Instant Criminal Background

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[23] Courts have generally rejected attempts to invoke other constitutional provisions to support gun rights claims in Second Amendment cases. *Tyler*, 2013 U.S. Dist. LEXIS 11511 at *19 (quoting *Albright v. Oliver*, 510 U.S. 266, 273 (1994)) ("Where a particular Amendment 'provides an explicit textual source of a constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims"). Nonetheless, we conclude that these provisions do not run afoul of the Fourteenth Amendment's Due Process Clause even were a court to consider such a claim. The Due Process Clause does not require the same process in all situations. Rather, a reviewing court will employ a three-part balancing test that requires an evaluation of (1) the person's private interest; (2) the risk of erroneous deprivation through the procedures used; and (3) the government's interest, including both the importance of the function and the burdens that requiring a different procedure would cause. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Here, a court would weigh the gun rights of an individual with a mental disability; the relatively minimal likelihood of an erroneous determination of mental disability; and the grave cost to public safety of an erroneous determination. Given all this, we think it is beyond cavil that the current process satisfies any due process requirement.

Check System operated by the Federal Bureau of Investigation.) Among other provisions of the NIAA, Congress determined what features would henceforth be necessary in a state "relief from disabilities" program to conform to the federal standard:

> **SEC. 105. RELIEF FROM DISABILITIES PROGRAM REQUIRED AS CONDITION FOR PARTICIPATION IN GRANT PROGRAMS.**
>
> (a) PROGRAM DESCRIBED.—A relief from disabilities program is implemented by a State in accordance with this section if the program—
>
> > (1) permits a person who, pursuant to State law, has been adjudicated as described in subsection (g)(4) of section 922 of title 18, United States Code, or has been committed to a mental institution, to apply to the State for relief from the disabilities imposed by subsections (d)(4) and (g)(4) of such section by reason of the adjudication or commitment;
> >
> > (2) provides that a State court, board, commission, or other lawful authority shall grant the relief, pursuant to State law and in accordance with the principles of due process, if the circumstances regarding the disabilities referred to in paragraph (1), and the person's record and reputation, are such that the person will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest; and
> >
> > (3) permits a person whose application for the relief is denied to file a petition with the State court of appropriate jurisdiction for a de novo judicial review of the denial.
>
> (b) AUTHORITY TO PROVIDE RELIEF FROM CERTAIN DISABILITIES WITH RESPECT TO FIREARMS.—If, under a State relief from disabilities program implemented in accordance with this section, an application for relief referred to in subsection (a)(1) of this section is granted with respect to an adjudication or a commitment to a mental institution or based upon a removal of a record under section 102(c)(1)(B), the adjudication or commitment, as the case may be, is deemed not to have occurred for purposes of subsections (d)(4) and (g)(4) of section 922 of title 18, United States Code.

NIAA, 122 Stat. 2569-70. The federal law does not require the states to conform to NIAA standards. A state is not eligible for certain grants, however, if it does not implement such a program. § 103(c) ("To be eligible for a grant under this section, a State shall certify, to the satisfaction of the Attorney General, that the State has implemented a relief from disabilities program in accordance with section 105."). Thus, the federal government has provided a "carrot" but not a "stick" for state compliance. It is clear that Maryland's current program is not NIAA compliant.

Senate Bill 281 establishes new, broader standards for disqualification from gun rights for reasons related to mental health and intellectual disability as well as a new process for restoration of these rights. In doing so, the bill would bring State law into conformity with NIAA standards. Under the bill, a person will be disqualified from ownership or possession of a regulated firearm, if the person:

- "suffers from a mental disorder" and has a "history of violent behavior" against him or herself or against another. Proposed PS § 5-133(b)(6). The operative language is carried forward from the existing law;

- has been found to be "incompetent to stand trial" or "not criminally responsible" under the relevant provisions of the Criminal Procedure Article. Proposed PS § 5-133(b)(7), (8). These are new bases for disqualification;

- "has been involuntarily committed" for any period of time[24] or "has been voluntarily admitted for more than 30 consecutive days" in a mental health facility. Proposed PS § 5-133(b)(9), (10). The previous language treated voluntary and involuntary admissions as the same. The new language recognizes the difference between voluntary admission and involuntary commitment and makes disqualification immediate in the case of an involuntary commitment and only after 30 consecutive days of a voluntary admission; or

- "is under the protection of a [court-appointed] guardian." Proposed PS § 5-133(b)(11).

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[24] State law does not elsewhere refer to an "involuntary commitment." As evidenced in proposed HG § 10-632(g), the term refers to an involuntary admission after an order by a hearing officer under HG § 10-632(e).

Proposed PS § 5-133(b) (6)-(12); *see also* proposed PS § 5-118(b)(3)(vii)-(xii) (providing identical standards for mental health-based disqualification from applying for a firearm qualification license); proposed PS § 5-205 (providing identical standards for mental health-based disqualification from possession of rifles and shotguns). Finally, Senate Bill 281 creates a process whereby those who are the subject of an involuntary commitment may be required to surrender their firearms. Proposed HG § 10-632.

Senate Bill 281 also establishes a new process to obtain relief from a firearms disqualification, which is set forth in proposed PS § 5-133.3. This process allows a person who was previously disqualified from gun possession or ownership by virtue of mental health- or intellectual disability-based criteria to apply for relief from the disqualification. To do so, a person must present an application supported, *inter alia*, by a certification from a psychiatrist or psychologist. Proposed PS § 5-133.3(d). The Department of Health and Mental Hygiene ("DHMH") reviews the application. DHMH must deny the application if it is found to be false, incomplete, or if

> the applicant has not shown by a preponderance of the evidence that the applicant will be unlikely to act in a manner dangerous to the applicant or to public safety and that granting a license to possess a regulated firearm or authorizing the possession of a rifle or shotgun would not be contrary to the public interest.

Proposed PS § 5-133.3(e). Otherwise, DHMH must certify that the person has been granted relief from the disqualification. Proposed PS § 5-133.3(f). If the application is rejected, the applicant may request a hearing by writing to the Secretary of Health and Mental Hygiene; that hearing must be held in accordance with the Administrative Procedure Act. Proposed PS § 5-133.3(g)(1), (2). The final administrative decision is subject to judicial review. Proposed PS § 5-133.3(g)(3).

The U.S. Department of Justice ("DOJ") has provided a worksheet to help states understand how compliance with the federal NIAA, discussed above, is determined. The DOJ worksheet identifies seven (7) minimum criteria that a relief from firearms disqualification program must satisfy: (1) the relief must be available as a matter of state law; (2) a person disqualified from gun ownership or possession must be afforded an opportunity to apply for relief; (3) the application for relief must be considered by a state court, board, commission, or other lawful authority; (4) the relief program must comport with due process; (5) the applicant for relief must have the opportunity to create a proper evidentiary record before the decisionmaker; (6) a decision granting relief must be based on a proper finding that the applicant "will not be likely to act in a manner dangerous to

public safety" and that "granting the relief not be contrary to the public interest;" and (7) "de novo" judicial review must be available.[25] Based on these factors, it is our view that the relief-from-disqualification provisions of Senate Bill 281 are NIAA compliant and, more importantly, will be found by DOJ to be NIAA compliant.[26] Moreover, it is our view that any NIAA compliant program for gun rights disqualification and restoration will more than satisfy any constitutional obligation either under the Second Amendment or the due process clause.[27]

VI. Wear and Carry Permits

Senate Bill 281 makes two changes to the provisions related to Maryland's so-called "wear and carry" permit law. The first clarifies that wearing or carrying a handgun in a manner that fails to comply with any conditions on the permit imposed by the Department of State Police is a crime under § 4-203(b)(2) of the Criminal Law Article. Although we had long believed that to be the law, the State Police had reported that prosecutions for obvious violations of geographic or temporal restrictions had been stymied by a misreading of this provision by some state circuit court judges. Second, Senate Bill 281 imposes a new training requirement of 16 hours for new permitees and 8 hours for renewal permitees. Proposed PS § 5-306 (a)(5). The addition of this requirement seems obviously intended to ensure that individuals permitted to wear and carry handguns in public have training designed to do so safely and, thus, bears a substantial relationship to the State's compelling interest in public safety. The Fourth Circuit Court of Appeals recently affirmed the constitutionality of Maryland's "wear and

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[25] In applying this factor, the DOJ requires the possibility of judicial review by a tribunal that may, but is not required to, defer to the initial factfinder, and which may, under appropriate circumstances, receive additional evidence. Senate Bill 281 authorizes judicial review consistent with that requirement.

[26] DOJ recommends that, in implementing a relief from disqualification program, states adopt a written procedure for ensuring that, as soon as practicable after a person has been granted relief, the disqualification is removed from federal databases and from state databases that report to NICS, and that DOJ is notified that the disqualification no longer applies.

[27] Although we do not believe such analysis is necessary, if these new mental health provisions are subjected to intermediate scrutiny, there is more than sufficient evidence to show that persons with serious mental illness are at greater risk for violence than are those persons without serious mental illness. Jeffrey W. Swanson *et al., Preventing Gun Violence Involving the Seriously Mentally Ill* in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis (2013).

carry" permit regime. *Woollard v. Gallagher*, ____ F.3d ____, 2013 U.S. App. LEXIS 5617 (4th Cir., Mar. 21, 2013). We do not expect the changes made by Senate Bill 281 to upset this result.

VII. Disqualifying Crimes

Senate Bill 281 also expands the circumstances in which a person is disqualified from gun ownership or possession by virtue of a criminal conviction, by adding the disqualification of individuals who receive a probation before judgment for a crime of violence, proposed PS § 5-101(b-1)(1)(i), and who are convicted of domestic-violence-related crimes except for assaults in the second degree. Proposed PS § 5-101(b-1)(2)(i). If crimes are expunged, however, they can no longer serve as a basis for disqualification. *Id.* We will analyze the two expansions separately.

Most of the crimes of violence listed in PS § 5-101(c) are felonies and, therefore, prohibitions on firearm possession by those convicted of these crimes are "presumptively lawful" under the Second Amendment. *Heller*, 554 U.S. at 626.[28] Moreover, as *Heller*'s examples of "presumptively lawful" regulation are "examples" only, and not an "exhaustive" list, *id.* at 627 n.26, we think it would be perfectly appropriate for a reviewing court to grant the same "presumptively lawful" status to Senate Bill 281's regulations disqualifying (1) violent misdemeanants; and (2) people that receive probations before judgment for crimes of violence. Another path to the same result is found in the "streamlined" process that the Fourth Circuit Court of Appeals uses to review Second Amendment challenges to statutes that disqualify persons from gun possession based on criminal conduct. Under the Fourth Circuit's test, only "law abiding responsible citizens" are entitled to the protections of the Second Amendment. *United States v. Pruess*, 703 F.3d 242, 245-46 (4th Cir. 2012). It seems clear to us that neither the distinction between felonies and misdemeanors, nor the court's decision to grant probation before judgment instead of sentencing for a conviction renders the persons involved as "law abiding responsible citizens." Thus, in our judgment, it does not offend the Second Amendment to preclude them from gun possession. Finally, even if persons convicted of misdemeanor crimes of violence and persons who receive probation before judgment for felony and misdemeanor crimes of violence retain Second Amendment

[28] As described above, the Fourth Circuit has expressed some uncertainty about whether "presumptively lawful" regulations are simply outside of the scope of the Second Amendment or whether such laws are within the scope of the Second Amendment but are nevertheless constitutional because they satisfy any applicable level of scrutiny. *Masciandaro*, 638 F.3d at 472-73 (describing but not resolving this "ambiguity" in the *Heller* opinion).

rights, we remain confident that the State will be able to carry its burden under intermediate scrutiny. *United States v. Staten*, 666 F.3d 154, 160-61 (4th Cir. 2011) (affirming firearm disqualification of domestic violence misdemeanant).

VIII. Lost and Stolen Guns

Senate Bill 281 has new gun owner accountability provisions requiring the reporting to proper authorities of any lost or stolen guns within 72 hours. Proposed PS § 5-146. This requirement does not appear to infringe on anyone's Second Amendment rights, as it would seem a great stretch to say that the right to keep and bear arms includes a right to remain silent in the face of public danger associated with arms that one no longer possesses. Even if this requirement is found to implicate the Second Amendment, however, we have no doubt that it will satisfy any level of judicial scrutiny applied given the importance of the State's interest in keeping guns out of the hands of criminals and the efficacy of gun owner accountability provisions like this in helping to accomplish that goal. Research indicates that states that mandate the reporting of lost and stolen guns have less gun trafficking. *See, e.g.*, Daniel W. Webster, *et al., Preventing the Diversion of Guns to Criminals through Effective Firearms Sales Laws,* in Reducing Gun Violence in America: Informing Policy with Evidence and Analysis (2013) (describing effectiveness of gun seller and owner accountability provisions, including requirement to report lost and stolen guns, on reducing availability of "crime guns"). Thus, we are confident that these provisions are constitutional.

IX. Provisions Related to Hunting

Senate Bill 281 establishes a new prohibition against shooting or discharging firearms within 300 yards of a public or private school anywhere in the State. This is precisely the type of regulation of firearm use in a "sensitive place[]" like a "school[] or government building[]" that the Supreme Court has already held to be "presumptively lawful." *Heller*, 554 U.S. at 626 & n.26.

We caution the compiler of laws that the codification of this provision of Senate Bill 281 will have to be made carefully (and cross-references modified) if you also approve House Bill 365, which creates a separate, smaller safety zone around "dwelling house[s], residence[s], church[es], or any other building or camp occupied by human beings," which applies to archery hunters in Harford County.

X. Dealer Provisions

Senate Bill 281 imposes new recordkeeping obligations on licensed gun dealers in the State of Maryland. Proposed PS § 5-145. Moreover, the bill would allow the Secretary of State Police to suspend the license of a dealer who fails to comply with these new recordkeeping requirements. Proposed CL § 5-115. These new requirements, however, are supplemental to the federal recordkeeping requirements under 18 U.S.C. § 923(g)(1)(A), as the federal records may be "used to satisfy the requirements" of the new State requirement. Proposed PS § 5-145(a)(4). These new provisions will allow the Maryland State Police to supplement the enforcement efforts of the federal Bureau of Alcohol, Tobacco, Firearms & Explosives ("ATF"). We do not anticipate any challenge to the State's power to enact this legislation. *See* 18 U.S.C. § 927 (federal Gun Control Act of 1968 does not preempt state law).

XI. Other Various Provisions

Senate Bill 281 also:

- expands the law enforcement exemption to the criminal prohibition on carrying weapons on school property. Proposed CL § 4-102.

- makes information about persons holding gun-related licenses exempt from disclosure under the Maryland Public Information Act ("MPIA"), proposed SG § 10-616(a)(v), a result that had previously been accomplished by regulation. SG § 10-617(c); COMAR 29.01.02.02B (9).[29]

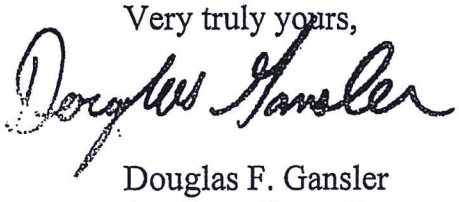
[29] This new exemption to the MPIA reflects a compromise between the legitimate privacy interests of those who hold firearm-related licenses and the State's need to understand its crime problem and the efficacy of attempts to address it. Pursuant to this provision, a MPIA requestor who seeks information about gun-related licensees will be denied. Proposed SG § 10-616(a)(v); *but see* SG § 10-612(c) (allowing release of license-holder information to members of the General Assembly). This reflects a change from the current MPIA, which allows the release of the names but no other "sociological information" (personal addresses, phone numbers, social security numbers, etc.) of firearms-related licensees. SG § 10-617(c); COMAR 29.01.02.02B (9). The provision does not, however, prevent the Department of State Police from using information about licensees for crime prevention purposes, or for gathering and using data regarding firearms-related licensees, *but see* proposed PS § 5-117.1(f)(6)(ii) (preventing use of fingerprints obtained from Handgun Qualification License applications for crime prevention purposes), deriving statistical information, or, in the exercise of its duties, releasing that data as it sees fit.

These changes, while potentially important, are not of constitutional significance.

XII. Conclusion

We hope that this thorough review will assure you and the citizens of Maryland that Senate Bill 281 was crafted carefully to balance the rights of legitimate gun owners with the need for increased public and law enforcement safety from gun violence. We are confident that the resulting legislation is constitutional and legally defensible.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Stacy A. Mayer
Karl Aro

COMMERCE CLAUSE – DISCRIMINATION AGAINST INTERSTATE COMMERCE – BEER FESTIVAL LICENSE

Bill/Chapter: House Bill 749/Chapter 387 and Senate Bill 767 of 2013

Title: Garrett County – Alcoholic Beverages – Licenses, Permits, and Other Authorizations

Attorney General's Letter: April 18, 2013

Issue: Whether a bill establishing a beer festival license that restricts the holder of the license to displaying and selling only beer manufactured and distributed in the State violates the Commerce Clause of the U.S. Constitution.

Synopsis: House Bill 749/Chapter 387 and Senate Bill 767 of 2013 are identical bills that establish a beer festival license authorizing the holder of the license to only display and sell beer that is manufactured and processed in the State and distributed in the State at the time the application for a license is filed. Under the license, beer may be displayed and sold at retail for consumption on or off the premises on the days and for the hours designated for a beer festival in Garrett County.

Discussion: Article I, § 8 of the U.S. Constitution reserves, for the U.S. Congress, the power to regulate interstate commerce. Relying on *Granholm v. Heald*, 544 U.S. 460 (2005), the Attorney General explained that, in all but the narrowest of circumstances, state laws violate the Commerce Clause if they mandate differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. Laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity. A discriminatory State statute may be upheld, however, if it advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives.

Citing *Granholm*, a 1993 opinion of the Attorney General, and a series of bill review letters from previous years, the Attorney General concluded that provisions limiting festivals to wine or beer manufactured or processed in Maryland violate the Commerce Clause. The Attorney General noted, however, that it had previously concluded that Maryland-wine-only or Maryland-beer-only provisions in festival bills are severable from the remainder of the legislation because the purposes of the legislation, promotion of Maryland wine and beer and of tourism, can be accomplished even if other wines or beers are sold as well.

The Attorney General advised, therefore, that the bills should be construed to authorize a holder of a license to display and sell beer that is manufactured and processed in "a state," consistent with a version of the bills, without amendments that added the Maryland-specific restriction at issue. The Attorney General cautioned, however, that the word "state" must be interpreted broadly to include foreign nations because the Commerce Clause also prohibits state interference with foreign commerce.

Drafting Tips: **If asked to draft legislation that in any way limits an authorized sale of a product to one that is manufactured and processed in the State, the drafter should advise the sponsor that the bill may violate the Commerce Clause for discriminating against interstate commerce. The drafter should discuss with the sponsor whether there are alternative ways to encourage the economic activity at issue in a manner that will achieve the desired objective without discriminating against interstate commerce.**

DOUGLAS F. GANSLER
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KATHRYN M. ROWE
Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 18, 2013

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

Re: House Bill 749 and Senate Bill 767

Dear Governor O'Malley:

We have reviewed House Bill 749 and Senate Bill 767, identical bills entitled "Garrett County - Alcoholic Beverages - Licenses, Permits, and Other Authorizations," for constitutionality and legal sufficiency. While we approve the bills, it is our view that a severable portion of the bills violates the Commerce Clause and cannot be given effect.

House Bill 749 and Senate Bill 767 each make a variety of changes in the alcoholic beverages laws in Garrett County. Among the changes is an authorization for the Board of License Commissioners to issue not more than two beer festival licenses. These licenses can be issued to a retail alcoholic beverages license, a Class 5 brewery license, a Class 6 pub-brewery license, or a Class 7 micro-brewery license. The holder of the festival license may obtain the beer to be displayed and sold at the beer festival from a licensed state wholesaler or the holder of a Class 5 brewery license, a Class 6 pub-brewery license, or a Class 7 micro-brewery license. While the participation of retail licensees and licensed wholesaler would make it possible to display and sell beer from around the country or the world, both bills were amended in the opposite house to limit the display and sale of beer to that "manufactured and sold in the State."

In past years, we have advised that provisions limiting festivals to wine or beer that is manufactured and processed in Maryland are unconstitutional as violative of the Commerce Clause of the United States Constitution. Opinion No. 93-012 (March 29, 1993); Bill Review Letter on House Bill 198 of 1995; Bill Review Letter on House Bill 95 of 1993; Bill Review Letter on House Bill 276 of 1991; Bill Review Letter on House Bills 1146 and 1353 of 1990. No changes in the law since that time would alter this view. In fact, in *Granholm v. Heald*, 544 U.S. 460 (2005), the Supreme Court found that a State law allowing in-state, but not out-of-state, wineries to sell wine directly to consumers violated the Commerce Clause.

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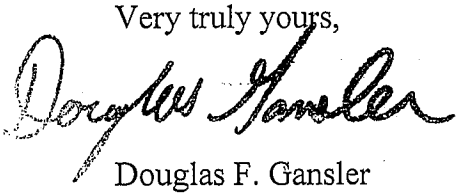
In the past, we have concluded that Maryland wine only or Maryland beer only provisions in festival bills are severable from the remainder of the bill as the purposes of the bills – promotion of Maryland wine and beer and of tourism – can be accomplished even if other wines or beers may be sold as well. The same conclusion applies here. As a result, we do not recommend veto of the bills. The requirement that the festivals be limited to beers from this State, however, cannot be given effect.[1] Thus, the bills should be read as if the opposite house amendments had not been made and the bills still provided that the holder of the beer festival license can display and sell beer that is manufactured and processed in a state.[2]

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/kmr/kk

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

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[1] Of course, the fact that the State must allow such sales does not mean that festival licensees are required to engage in them.

[2] Moreover, because the Commerce Clause also prohibits state interference with foreign commerce, it is our view that the word must be given a broad meaning in this context. It is well-recognized that the meaning of the word "State" varies depending on the context in which is appears and the purpose of the statute. *Boissevain v. Boissevain*, 220 N.Y.S. 579 (1927). In some cases it is limited to states within the United States, *Eidman v. Martinez*, 184 U.S. 578 (1902); *Rashid v. Drumm*, 824 S.W.2d 497 (Mo. App. 1992); *O'Reilly v. Fox Chapel Area School Dist.*, 527 A.2d 581 (Pa. Cmwlth. 1987); *Massey v. Massey*, 452 N.Y.S.2d 101 (1982), while in others it is interpreted more broadly to include foreign nations, *Ruppen v. Ruppen*, 614 N .E.2d 577 (Ind.1993); *In re Hudson's Estate*, 187 Cal. Rptr. 532 (1982); *Scott & Williams. Inc. v. Bd. of Taxation*, .372 A.2d 1305 (N.H. 1977); *Fessenden v. Radio Corp. of America*, 10 F.Supp. 394 (D.C. Del. 1935); *Foster v. Stevens*, 22 A. 78 (Vt. 1891). The broad meaning is required by this context.

COMMERCE CLAUSE – TAX CREDITS FOR STATE BUSINESS INVESTMENTS

Bill/Chapter: House Bill 803/Chapter 390 of 2013

Title: Income Tax – Business and Economic Development – Cybersecurity Investment Incentive Tax Credit

Attorney General's Letter: General Approval Letter dated April 29, 2013, footnote 2.

Issue: Whether a bill that provides a credit against State income tax for entities that invest in State-connected businesses violates the Commerce Clause of the U.S. Constitution.

Synopsis: House Bill 803/Chapter 390 of 2013 creates a tax credit against the State income tax for qualified investments in Maryland cybersecurity companies. A qualifying company is defined as a for-profit entity that is primarily engaged in the development of innovative and proprietary cybersecurity technology and meets specified criteria, including requirements that the company has its headquarters and base of operations in the State.

Discussion: The Commerce Clause of the U.S. Constitution, U.S. Constitution Article I, § 8, cl. 3, grants Congress the power to regulate commerce among the "several States." The courts have determined that this provision also prohibits state interference with interstate commerce.

The Attorney General cautioned that the Maryland Court of Appeals recently concluded that a State law violates the Commerce Clause by not allowing a taxpayer a credit for payment of out-of-state income taxes. The Attorney General noted, however, that the Supreme Court has not directly addressed whether state tax incentives that reward a company's in-state activities violate the dormant Commerce Clause[1] and that the Court has said that the Constitution "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." Concluding, the Attorney General stated that, while not entirely free from doubt, House Bill 803 is not clearly unconstitutional.

[1] The dormant commerce clause is a restriction on state power that is not explicitly articulated in the U.S. Constitution, but that has been derived as a necessary corollary of a power to regulate commerce specifically conferred on Congress by the U.S. Constitution.

Drafting Tips: **When drafting a bill that involves State taxation and commerce, the drafter should consider the requirements of the Commerce Clause. In cases where the legislation provides a tax incentive favoring State connected businesses, greater constitutional scrutiny is required to prevent the State from interfering with interstate commerce by providing a direct competitive advantage to local business.**

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Attorney General

Katherine Winfree
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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 29, 2013

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

SENATE	HOUSE
SB 90[1]	HB 361
SB 575	HB 453

[1] While the provisions of SB 90 deal with two different taxes, in our view each of the provisions relates to revenues of the Waterway Improvement Fund, and thus do not violate the single subject rule.

Uncodified Section 5 was amended into SB 90 in an attempt to avoid a potential problem under Section 2 relating to taxes that are pledged to pay the principal and interest on consolidated transportation bonds. Section 5, however, says "notwithstanding Section 1 of this Act ...". Section 1 provides for the vessel excise tax cap, while Section 2 contains the actual distribution of the motor vehicle fuel tax to the Waterway Improvement Fund. In our view, a reading of the various sections of the bill together as well as the legislative history make it clear that Section 5 should be read to refer to Section 2. This drafting error should, however, be corrected in next year's corrective bill.

Finally, in a list or series of items, the "and" or "or" should be placed before the last item in the series. While a new "and" was correctly placed on page 4, line 9, the "and" in line 8 should have been repealed. This may also be corrected in next year's corrective bill.

SENATE	HOUSE
SB 881	HB 803[2]
	HB 964
	HB 1499

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/mb

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

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[2] HB 803 creates a tax credit for qualified investments in Maryland cybersecurity companies, if, among other requirements, the company has its headquarters and base of operations in Maryland. Thus, the bill raises a constitutional Commerce Clause issue. The Commerce Clause "prohibits States from legislating in ways that impede the flow of interstate commerce." *Star Scientific, Inc. v. Beales*, 278 F.3d 339, 354-55 (4th Cir. 2002). Relying heavily on Supreme Court precedent, the Maryland Court of Appeals recently concluded that a State law violates the Commerce Clause by not allowing a taxpayer a credit for payment of out-of-state income taxes. *Comptroller v. Wynne*, 2013 Md. LEXIS 17 (Jan. 28, 2013). The Court noted that the law resulted in "different treatment for a Maryland resident taxpayer who earns substantial income from out-of-state activities when compared with an otherwise identical taxpayer who earns income entirely from Maryland activities." *Id.* at *19. Nevertheless, the Supreme Court has not directly addressed whether state tax incentives that reward a company's in-state activities violate the dormant Commerce Clause. The Court has said, however, that the Constitution "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977). *See also W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1977) ("We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that 'direct subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause.") Moreover, the Court has made clear that state taxpayers lack standing in federal court to challenge state tax credits as a violation of the federal Commerce Clause. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006). Accordingly, while it is not entirely free from doubt, it is our view that HB 803 is not clearly unconstitutional.

COMMERCE CLAUSE – TAX CREDIT FOR IN-STATE ACTIVITIES

Bill/Chapter: House Bill 1017/Chapter 659 of 2013

Title: Income Tax Credit – Wineries and Vineyards

Attorney General's Letter: General Approval Letter dated May 7, 2013, footnote 3.

Issue: Whether a State tax credit that is available only to companies with operations in Maryland violates the dormant Commerce Clause.

Synopsis: House Bill 1017/Chapter 659 of 2013 created a tax credit for qualified capital expenses made in connection with the establishment of new wineries or vineyards or for capital improvements made to existing wineries or vineyards. The credit is limited to in-state wineries and vineyards.

Discussion: The Attorney General advised that Article I, § 8 of the U.S. Constitution has been interpreted to prohibit states from "legislating in ways that impede the flow of interstate commerce." A tax credit that is available only to in-state persons could run afoul of this interpretation. The Attorney General pointed to a Maryland Court of Appeals decision holding a State law in violation of the Commerce Clause for not allowing a taxpayer a credit for payment of out-of-state income taxes. In that case, the court reasoned that the law resulted in different treatment for a Maryland resident taxpayer who earned substantial income from out-of-state activities when compared with an otherwise identical taxpayer who earned income entirely from Maryland activities.

House Bill 1017 differs from this precedent, however, in that there is no differential treatment of taxpayers. No out-of-state wineries or vineyards are subject to the tax; thus, while only in-state applicants are eligible for the credit, these wineries and vineyards are also the only applicants subject to payment of the tax. The Attorney General noted the U.S. Supreme Court's stated willingness to allow a state to structure its tax system to incentivize in-state commerce and industry without declaring a violation of the dormant Commerce Clause. The Attorney General concluded, therefore, that the bill was not clearly unconstitutional.

Drafting Tips: **If asked to draft legislation that includes a tax credit that only benefits in-state persons, the drafter should consider whether out-of-state persons are subject to the tax and whether any benefit or incentive that is provided only to in-state persons denies an out-of-state person that same benefit or incentive. If so, the drafter should advise the sponsor that the bill may violate the dormant Commerce Clause.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
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Counsel to the General Assembly

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Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 7, 2013

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

SENATE	HOUSE
SB 696[1]	HB 621
SB 863[2]	HB 653
SB 887	HB 794[1]
	HB 895

[1] SB 696 is identical to HB 794.

[2] SB 863 and its crossfile HB 1124 are not entirely identical. SB 863, in new subsection 15-101(d)(2), states that "'Gas pipeline' does not mean any transmission line or distribution line constructed, owned, or operated by a public service company as defined in § 1-101 of the Public Utilities Article." HB 1124, on the other hand, states in the same subsection that "'Gas pipeline' does not include any transmission line or distribution line constructed, owned, or operated by a public service company." Because SB 863 provides a clearer definition, we suggest signing only the Senate Bill, or if both are signed, signing the Senate Bill last.

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HOUSE

HB 1017[3]

HB 1124[2]

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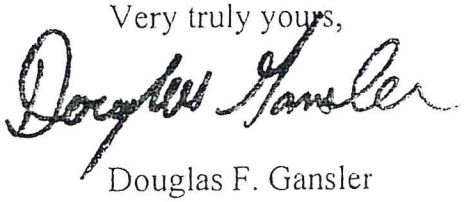
[3] HB 1017 creates a tax credit for qualified capital expenses made in connection with the establishment of new wineries or vineyards or for capital improvements made to existing wineries or vineyards. A vineyard is defined as, among other things, agricultural land located in the State; and a winery is an establishment holding a winery license or a limited winery licensed issued by the Comptroller. Because the tax credit is limited to in-state vineyards, the bill raises a constitutional Commerce Clause issue. The Commerce Clause "prohibits States from legislating in ways that impede the flow of interstate commerce." *Star Scientific, Inc. v. Beales,* 278 F.3d 339, 354-55 (4th Cir. 2002). Relying heavily on Supreme Court precedent, the Maryland Court of Appeals recently concluded that a State law violates the Commerce Clause by not allowing a taxpayer a credit for payment of out-of-state income taxes. *Comptroller v. Wynne*, 2013 Md. LEXIS 17 (Jan. 28, 2013). The Court noted that the law resulted in "different treatment for a Maryland resident taxpayer who earns substantial income from out-of-state activities when compared with an otherwise identical taxpayer who earns income entirely from Maryland activities." *Id.* at *19. Nevertheless, the Supreme Court has not directly addressed whether state tax incentives that reward a company's in-state activities violate the dormant Commerce Clause. The Court has said, however, that the Constitution "does not prevent the States from structuring their tax systems to encourage the growth and development of intrastate commerce and industry." *Boston Stock Exch. V. State Tax Comm'n*, 429 U.S. 318, 336 (1977). *See also W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 n.15 (1977) ("We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that 'direct subsidization of domestic industry does not ordinarily run afoul' of the negative Commerce Clause.") Moreover, the Court has made clear that state taxpayers lack standing in federal court to challenge state tax credits as a violation of the federal Commerce Clause. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006). Accordingly, it is our view that HB 1017 is not clearly unconstitutional.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

DUE PROCESS CLAUSE – INVALID DELEGATION OF LEGISLATIVE AUTHORITY – ZONING VARIANCES

Bill/Chapter: Senate Bill 370/Chapter 463 of 2013

Title: Garrett County – County Commissioners – Industrial Wind Energy

Attorney General's Letter: May 8, 2013

Issue: Whether a bill authorizing a unit of local government to grant variances from certain zoning restrictions violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution if the bill requires the consent of adjoining landowners before the governing body may consider a variance request and if the bill does not provide a standard for the governing body to apply in deciding whether a variance should be granted.

Synopsis: Senate Bill 370/Chapter 463 of 2013 requires a wind turbine in Garrett County to comply with a minimum setback distance equal to no less than two-and-a-half times the structure height. An applicant proposing to build a new wind turbine may seek a variance of up to 50% of the minimum setback distance requirements from the Garrett County Department of Planning and Land Development (department), but only after the applicant obtains the written consent of all adjoining property owners. The bill does not provide a standard for the department to apply when considering a variance request.

Discussion: Section 1 of the Fourteenth Amendment of the U.S. Constitution provides that a person may not be deprived of life, liberty, or property without due process of law. The Due Process Clause has been held to prohibit a legislative body from delegating authority over the granting of land use variances to unelected officials, unless the legislative body first establishes adequate guides and standards for the exercise of that authority.

Maryland Courts have not examined whether requiring the consent of adjoining property owners as a precondition for seeking a variance from a zoning restriction violates the Due Process Clause. According to the Attorney General, however, other courts have held similar consent provisions to be unconstitutional because they effectively delegate the task of determining whether a variance is in the interest of public health and welfare to private citizens who may exercise this power arbitrarily. Under Senate Bill 370, an adjoining landowner could prevent a neighbor from making an otherwise valid request for a variance from Garrett County's setback requirements for wind turbines. Such a delegation of zoning

authority to individual landowners, the Attorney General concluded, is of doubtful constitutionality.

The Attorney General also raised due process concerns about the bill's failure to provide a standard for the department to apply when considering a variance request. In general, administrative officials who are appointed by the executive and not elected by the people may not legislate. Administrative officials may only find and apply facts in particular cases in accordance with policy established by the legislative body. The Attorney General suggested that the department provisionally apply the general variance standard for commission counties appearing in § 4-206 of the Land Use Article. The Attorney General recommended that, during the next session, the General Assembly should either add a variance standard to the wind turbine law or transfer the law to the Land Use Article so that the variance standard in that article would more clearly apply.

Drafting Tips: **When drafting legislation authorizing a unit of local government to grant variances from a zoning or land use restriction, a drafter should ensure that variance procedures are consistent with the requirements of the Due Process Clause. The legislation should either establish clear standards and procedures for the consideration of variance requests, or reference existing standards and procedures from the Land Use Article. Consideration of a variance request that is made contingent on the consent of adjoining property owners is of doubtful constitutionally.**

DOUGLAS F. GANSLER
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Assistant Attorneys General

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 8, 2013

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

Re: Senate Bill 370, "Garrett County – County Commissioners – Industrial Wind Energy"

Dear Governor O'Malley:

We have reviewed Senate Bill 370 entitled, "Garrett County – County Commissioners – Industrial Wind Energy." We write to point out a provision of doubtful constitutionality relating to adjoining property owners' consent to a variance for an individual industrial energy conversion system (commonly known as a "wind turbine") from a setback requirement. While it is our view that this consent provision is likely to be unconstitutional, we believe that it can be severed from the bill. There are also other legal problems relating to this variance provision that should be corrected in the next session of the General Assembly. The other provisions concerning bonds and decommissioning of wind turbines in Senate Bill 370 are constitutional and legally sufficient.

Senate Bill 370 provides for a minimum setback for a wind turbine of "no less than two and a half times the structure height" in Garrett County. The applicant of the proposed wind turbine may seek a variance from the setback requirement with the Garrett County Department of Planning and Zoning ("Department") of up to 50% of the minimum setback distance "on written authorization of all property owners of adjoining parcels." In addition, the bill provides for bonding requirements for wind turbines and requirements for the decommissioning of wind turbines if the turbine has not generated electricity for a certain period of time or the owner abandoned the turbine.

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Garrett County is unique in Maryland in that the County has not adopted countywide zoning despite the fact that the Land Use Article of the Maryland Code grants commissioner counties the power to adopt comprehensive zoning. Rather, the Board of County Commissioners adopted zoning in only a small portion of the County, around Deep Creek Lake. In 2009, this Office was asked whether the Garrett County Commissioners could adopt a zoning ordinance to promulgate standards for the development of wind turbines in Garrett County to include tall structure conditions and restrictions and set-back provisions. Letter of Advice to Senator George Edwards, January 21, 2009. This Office advised that if the Garrett County Commissioners wished to adopt a conventional approach to zoning for wind turbines that would include setback provisions, it could only be accomplished through the adoption of comprehensive zoning for all uses in the County because the authority to zone delegated to counties envisioned "comprehensive zoning" rather than just zoning for a particular use such as wind turbines. Md. Code Ann., Land Use Article ("LU") §4-101.

Even though the Garrett County Commissioners are bound by the restrictions in the Land Use Article that require them to act comprehensively through zoning rather than by particular uses, the General Assembly is not bound by those restrictions. It is the State of Maryland that holds the power to zone, which is part of the police powers of the State, and the General Assembly may exercise that zoning power in a non-comprehensive way by placing a setback requirement on a particular use such as a wind turbine. Even though the General Assembly may enact a setback requirement for wind turbines in Garrett County, the exercise of that police power is subject to constitutional standards including due process.

While Maryland courts have not examined whether a consent requirement of all adjoining property owners or a portion of consent of adjoining property owners as a requirement for zoning or for seeking a variance from a zoning restriction, such as a setback, is constitutional, other courts have. In *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928), the U.S. Supreme Court examined the constitutionality of a zoning ordinance that required the written consent of two-thirds of the property owners within 400 feet of the proposed building before a building permit could be issued for home for elderly residents. The Supreme Court struck down the zoning ordinance stating:

> [t]here is no provision for review under the ordinance; their [the neighboring property owners] failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the [proposed owner] to their will or

> caprice. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment.

Id. at 122.

A more recent case where consent of all of the adjoining or abutting property owners was required in order to obtain a variance from the lot area requirements and for a two-family dwelling was *Lakin v. City of Peoria*, 472 N.E. 2d 1233 (Ill. App. 1984). The property owner applying for the variance was unable to obtain the consent of all of the owners of property that adjoined or abutted the property and challenged the validity of the ordinance. *Id.* at 1235. The court held that the consent requirement was unconstitutional stating:

> [i]n the instant case, [the zoning ordinance] leaves the ultimate determination of whether a two-family dwelling will be detrimental to the public welfare to the whim and caprice of neighboring property owners rather than to a reasoned decision by the city. We hold, therefore, that the consent provision in [the zoning ordinance] has no bearing on the public health, safety or welfare and that it constitutes an invalid delegation of legislative power.

Id. at 1236; *Janas v. Town of Fleming*, 382 N.Y.S.2d 394, 397 (N.Y.App. Div. 1976) (special zoning permit that required consent of majority of adjoining property owners before the permit could be granted by the zoning board was unconstitutional because it delegated zoning authority to individual landowners who, by withholding their approval, may effectively prevent the board from considering an otherwise proper application); *but see, e.g., Robwood Advertising Associates, Inc. v. Nashua*, 153 A.2d 787 (N.H. 1959) (consent provision for a variance was constitutional because it was a condition precedent to a hearing on the variance).[1]

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[1] There are some cases like *Robwood* that have found consent provisions for variances to be constitutional based on a subtle distinction between creating a zoning restriction by prohibiting a use and waiving a zoning restriction through a variance process. We do not believe that the Court of Appeals of Maryland will adopt this reasoning. Indeed, the Supreme Court of Illinois, which initially used this distinction reversed itself two years later noting "...we have given the matter further study and feel that the subtle distinction between 'creating' and 'waiving' a restriction cannot be justified. Each constitutes an invalid delegation of legislative power where the ordinances, as here, leave the ultimate determination of whether the erection of the [gas] station would be detrimental to the public welfare in the discretion of individuals rather than the city." *Drovers Trust & Savings Bank v. City of Chicago*, 165 N.E.2d 314, 315 (Ill. 1960).

By requiring the consent of all adjoining property owners prior to the applicant applying for the variance, the General Assembly in Senate Bill 370 has given neighboring property owners the power to determine whether or not a variance from the setback requirement for wind turbines would be detrimental to the public health and welfare. Thus, it is our view that such a delegation of zoning authority to individual landowners is of doubtful constitutionality. We believe, however, that this consent requirement can be severed from Senate Bill 370. Md. Ann. Code, Art. I, §23 (provisions severable unless "specifically stated" that they are not); *see also Lakin* at 1238 (consent provision in zoning ordinance was not an integral or essential part of the ordinance).[2] We suggest that if you approve the bill notwithstanding the defect, that Garrett County should administer the law as if the adjoining property owners' consent is not required. Next year, the offending provision should be excised.

Severing the adjoining property owner consent requirement from the variance provision does not, however, remove all legal problems. We note that this provision gives the Department the authority to grant a variance from the wind turbine setback requirement but provides no standards for the Department to apply in deciding whether the variance should be granted. Generally, when legislative power is delegated to administrative officials it is constitutionally required that adequate guides and standards be established by the delegating legislative body. *Commission on Medical Discipline v. Stillman*, 291 Md. 390, 413-414 (1981). These standards are necessary so that the administrative officials, appointed by the executive and not elected by the people, will not legislate, but will find and apply facts in a particular case in accordance with the policy established by the legislative body. While Senate Bill 370 does not contain a variance standard nor does Article 25 of the Code where this provision is located, it is our recommendation that the Department should apply the variance standard for commissioner counties that is found in the LU Article §4-206. The General Assembly in the next session should either amend §238G(c) of Article 25 to add a variance standard to this provision, or transfer this provision to the Land Use Article so that the variance standard in that Article would more clearly apply.[3]

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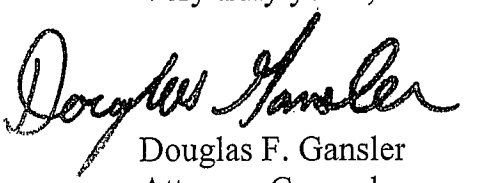
[2] Under Maryland common law, an adjoining property owner has standing in court to challenge a land use decision because an adjoining owner is deemed to be "specially damaged, and therefore a person aggrieved." *Ray v. Mayor and City Council of Baltimore*, 430 Md. 74, 81 (2013).

[3] Senate Bill 370 also does not provide a statutory mechanism for an appeal of the Department's decision to grant a variance from the wind turbine set back. This lack of appeal provision does not remove the Department's decision from judicial review because other review

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/ASC/kk

cc: The Honorable George C. Edwards
The Honorable John P. McDonough
Stacy Mayer
Karl Aro

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mechanisms provided through the Maryland Rules are likely to apply. *See* Md. Rules 7-401 to 7-403 (administrative mandamus). However, the General Assembly may wish to consider adding an appeal provision to this section since all other land use variances authorized by State law have statutory provisions for an appeal. If the General Assembly moves this provision to the Land Use Article then the Board of Appeals would hear an appeal of the Department's decision. *See* Md. Ann. Code, LU §§4-305 and 4-306.

EQUAL PROTECTION CLAUSE – STATE FUND ELIGIBILITY – CLASSIFICATION BASED ON CITIZENSHIP AND RESIDENCY

Bill/Chapter: Senate Bill 632/Chapter 511 of 2013

Title: State Brain Injury Trust Fund

Attorney General's Letter: May 8, 2013

Issue: Whether a bill that requires an individual to be a U.S. citizen and a resident of the State at the time of injury to be eligible to receive services financed by a State trust fund violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution or Article 24 of the Maryland Declaration of Rights.

Synopsis: Senate Bill 632/Chapter 511 of 2013 establishes the State Brain Injury Trust Fund (fund) as a special, nonlapsing fund for the purpose of assisting in the provision of specified services to eligible individuals who have sustained brain injuries. To be eligible for assistance from the fund, an individual must (1) have been a U.S. citizen and State resident at the time of the injury; (2) have a documented brain injury; (3) have income no greater than 300% of the federal poverty level; and (4) have exhausted all other health, rehabilitation, and disability benefit funding sources that cover services provided by the fund.

Discussion: The Attorney General reviewed several precedential opinions that have analyzed citizenship and durational residency requirements to determine whether such requirements violate the Equal Protection Clause. The Attorney General noted that the U.S. Supreme Court has long held that discrimination in economic programs against lawful permanent residents who are not citizens is subject to strict scrutiny and further noted that the Maryland Court of Appeals has concluded that cost savings are not a sufficient justification to satisfy the strict scrutiny standard.

The Attorney General noted that the Supreme Court has also held that states, in providing welfare benefits, may not discriminate against persons who have recently moved to the State. According to the Attorney General, while the State may require an applicant for benefits from the fund to be a resident of the State at the time of application, durational residency limitations as found in Senate Bill 632 may be constitutionally invalid. The Attorney General concluded that the invalid provisions should be treated as severable and not given effect.

Drafting Tips: **Drafters should be aware that courts have shown a willingness to strike down citizenship and durational residency requirements for recipients of State benefits. When drafting legislation that imposes such requirements, the drafter should discuss this concern with the sponsor and advise the sponsor of constitutional issues that might arise.**

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THE ATTORNEY GENERAL OF MARYLAND
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May 8, 2013

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

Re: Senate Bill 632, "State Brain Injury Trust Fund"

Dear Governor O'Malley:

We have reviewed Senate Bill 632, "State Brain Injury Trust Fund," for constitutionality and legal sufficiency. While we believe that the bill may be signed into law, it is our view that a severable portion thereof is unconstitutional and should not be given effect.

Senate Bill 632 creates the State Brain Injury Trust Fund for the purpose of providing individual case management services and neurological evaluation for individuals who have sustained brain injuries.[1] The bill provides that to be eligible for these services an individual must be "a United States citizen and a resident of the State at the time of the brain injury." It is our view that both portions of this requirement are invalid and cannot be enforced.

[1] The bill, in HG § 13–21A–02(h), also provides that "MONEY EXPENDED FROM THE FUND TO SUPPORT SERVICES TO INDIVIDUALS WITH BRAIN INJURIES IS SUPPLEMENTAL TO AND IS NOT INTENDED TO TAKE THE PLACE OF FUNDING THAT WOULD OTHERWISE BE APPROPRIATED FOR THOSE SERVICES." This language is an expression of legislative intent only and is not binding on the Governor's appropriation decisions. Statutory language suggesting that appropriations must "supplement not supplant" other appropriations is inconsistent with the Executive Budget Amendment unless structured as a constitutional funding mandate. This language does not constitute a funding mandate because it does not identify a specific sum that must be appropriated or a formula by which such an amount may be calculated.

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The Supreme Court has long held that discrimination in economic programs against lawful permanent residents who are not citizens is subject to strict scrutiny. *Cabell v. Chavez-Salido*, 454 U.S. 432, 439 (1982); *Graham v. Richardson*, 403 U.S. 365, 372 (1971). In the *Graham* case, the Court specifically rejected the argument that "a State's desire to preserve limited welfare benefits for its own citizens" could "justify Pennsylvania's making noncitizens ineligible for public assistance." 403 U.S. at 374. In *Ehrlich v. Perez*, 394 Md. 691 (2006), the Court of Appeals, following these cases and others, applied strict scrutiny to the Governor's decision not to fund comprehensive medical care for legal immigrant women under the age of 18 or who were pregnant. In doing so, it concluded that cost savings were not a sufficient justification to satisfy the strict scrutiny standard and found the failure to fund these services to be invalid.[2] It is our view that this rationale would also apply to the citizenship requirement in Senate Bill 632 and that the provision is invalid.[3]

The Supreme Court has also long held that states may not discriminate against persons who have recently moved to the State in providing welfare benefits. In *Saenz v. Roe*, 526 U.S. 489 (1999), the Court found a California law that limited welfare benefits for new residents to the amount that the state they moved from would have paid was invalid, applying strict scrutiny to the classification because it penalized the right to travel. *Id.*, 526 U.S. at 499-504. The Court found that neither the desire to deter welfare applicants from migrating to the State nor the desire to save money could justify the discrimination against recent residents. *Id.*, 526 U.S. at 506-507. Similarly, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), the Supreme Court found a one year residency requirement for welfare benefits to be invalid.

While it is clear that the State may require an applicant for benefits from the State Brain Injury Trust Fund to be a resident of the State at the time of the application, Senate

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[2] In the *Perez* case, the Court also discussed whether the discrimination should be subject to a lesser standard because the discrimination was expressly permitted by federal law. The Court rejected this argument based on its conclusion that the federal law did not establish a uniform rule for the states to follow and thus did not call for application of a lesser standard. We are not aware of any federal law that could be read to justify the discrimination against lawful resident aliens in Senate Bill 632.

[3] While benefits under the program must be made available to lawful resident aliens, federal law prohibits the State from providing health benefits to undocumented aliens unless State law expressly provides for such eligibility. 8 U.S.C. § 1621.

Bill 632 requires instead that they have been a resident at the time of the brain injury. This effectively imposes the same type of durational residency limitations as were found invalid under *Saenz* and *Shapiro*. As a result, we believe that requirement also is constitutionally invalid.

While we find that these provisions are invalid, it is our view that they are severable from the remainder of the bill. The primary inquiry in this determination is what would have been the intent of the legislature had they known that these provisions could not be given effect. *Davis v. State*, 294 Md. 370, 383 (1982). Generally courts will assume "that a legislative body generally intends its enactments to be severed if possible." *Id*; *see also* Article 1, § 23 ("[t]he provisions of all statutes . . . are severable unless the statute specifically provides that its provisions are not severable."). Thus, "when the dominant purpose of a statute may largely be carried out notwithstanding the invalid provision, courts will ordinarily sever the statute and enforce the valid portion." *Id.* at 384. In this case, it is clear that the program is "complete and capable of execution," *Migdal v. State*, 358 Md. 308, 324 (2000), without the invalid limitations. Therefore, it is our view that the invalid provisions should be treated as severable and not given effect.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable Nancy J. King
The Honorable John P. McDonough
Stacy Mayer
Karl Aro

EQUAL PROTECTION – MINORITY BUSINESS ENTERPRISES – RACE-CONSCIOUS PROGRAMS

Bill/Chapter: House Bill 226/Chapter 3 of 2013

Title: Maryland Offshore Wind Energy Act of 2013

Attorney General's Letter: April 8, 2013

Issue: Whether a bill requiring selected project applicants to comply with the State's Minority Business Enterprise (MBE) program violates the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

Synopsis: House Bill 226/Chapter 3 of 2013 creates a framework and process for financing and providing regulatory approval of wind energy projects to be located off Maryland's Atlantic coast. The bill includes a provision that requires a selected project applicant to comply with the MBE program that established certain procurement and contractor hiring goals to help remedy past and present racial discrimination.

Discussion: The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution has been interpreted to require that racial classifications in governmental programs meet a strict scrutiny standard. The standard requires a compelling governmental interest in remedying identified past and present discrimination, and the program must be narrowly tailored to achieve the goal of remedying this discrimination. The Attorney General cited precedent establishing that MBE programs are only permissible when the governmental entity seeks to eradicate discrimination by the governmental entity itself or to prevent the public entity from acting as a "passive participant" in a system of racial exclusion practiced by the industry being regulated.

In the analysis of House Bill 226, the Attorney General cited a recent disparity study conducted by the State which evidenced discrimination against minority and women contractors in State contracting. The Attorney General also pointed to an expert economist's letter in support of the conclusion that, without the MBE provision in the bill, the State would become a passive participant in discrimination that exists in the industries involved. This evidence provides a strong basis in fact to support the State's desire to conduct a race-conscious remedial program in the area of offshore wind energy, according to the Attorney General.

In addressing the second prong of the strict scrutiny standard, the Attorney General noted that House Bill 226 included efforts to limit burdens on third parties, prohibited the use of quotas, made waivers available for good

faith efforts, and authorized flexible goals. The Attorney General concluded that the State has a compelling governmental interest that justified the enactment of the bill's MBE provisions and that the bill was narrowly tailored to achieve its objectives.

Drafting Tips: **If asked to draft legislation that deals with minority business procurement or contracting requirements, the drafter should advise the sponsor that past or present discrimination that the government seeks to remedy must be objectively identifiable. In order to survive an equal protection challenge, the bill must also be narrowly tailored to address the discrimination.**

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 8, 2013
~~April 8, 2012~~

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

Re: House Bill 226

Dear Governor O'Malley:

We have reviewed House Bill 226, the "Maryland Offshore Wind Energy Act of 2013," which creates a framework and process for financing[1] and providing regulatory approval of wind energy projects to be located off Maryland's Atlantic coast.[2] We hereby approve the bill for constitutionality and legal sufficiency. We write to explain the basis on which we find the minority business and outreach provisions to satisfy the appropriate levels of constitutional scrutiny.

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[1] Two aspects of the financing component of the bill merit mention. First, as amended by the bill, State Government Article, §9–20C–03(h) (p.33), and Section 4 (concerning the Exelon-Constellation merger settlement funds) purport to require the transfer of certain funds. To preserve the Governor's constitutional prerogative to initiate appropriations, §9–20C–03(h) and Section 4 must be construed as authorizations rather than mandates to transfer the specified funds. Thus, the Governor may, but is not constitutionally required to, transfer the funds described in §9–20C–03(h) and Section 4. Second, as we explained in a letter dated March 18, 2013, it is our view that the appropriations and funding authorizations in the bill to assist in financing these wind projects are part of the dominant purpose of the bill and that, therefore, this bill may not properly be petitioned to referendum. *See* Md. Const., art. XVI, §2.

[2] The federal government has the sole authority to regulate and license wind projects on the outer continental shelf. 43 U.S.C. §1331 *et seq.* This bill does not and cannot change this. The State's role under HB 226, in the form of the Public Service Commission's approval of an application by a wind developer for a qualified offshore wind project, functions exclusively to establish the state incentive revenue stream for the project, not license or approve the project. Therefore, the bill is not preempted by federal law.

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Minority Business Enterprise Program

The Offshore Wind Energy Act of 2013 includes a provision that any applicant selected must comply with the State's Minority Business Enterprise ("MBE") Program "to the extent practicable and permitted by the United States Constitution." Proposed PU §7-704.1(e)(3)(ii).

As United States Supreme Court Justice Anthony M. Kennedy wrote in his concurrence in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, "The government bears the burden of justifying its use of individual racial classifications." 551 U.S. 701, 784 (2007) In the context of MBE programs, the use of numerical goals based on individual racial classifications must meet strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989). Courts have held that a government entity has a compelling interest in remedying identified past and present race discrimination. *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492, 509 (1989). MBE goal programs are permissible only when the governmental entity seeks to eradicate discrimination by the government entity itself, or to prevent the public entity from acting as a "passive participant" in a system of racial exclusion practiced by elements of local industry by allowing tax dollars "to finance the evil of private prejudice." *Id.* at 492; *Associated Utility Contractors of Maryland v. Mayor and City Council of Baltimore*, 83 F. Supp. 2d 613, 619 (D. Md. 2000).

To date, all of the cases considering the permissibility of goal programs based upon racial classifications in the context of contracting and procurement have dealt with procurement by the government itself. It is our view, however, that this does not mean that such programs cannot be administered constitutionally in other contexts and by other parties. In fact, this Office has approved the application of the State's MBE program to private licensees in the construction and operation of video lottery terminal facilities. State Gov't ("SG") Article, §9-1A-10. Moreover, the bill contemplates significant State financial involvement both in the form of monetary transfers from the Strategic Energy Investment Fund ("SEIF") and by governmental approval of the ratepayer increases to pay for it. This public investment only strengthens the case for application of an MBE program. Thus, I believe that there is a sufficient basis for a court to find that, if the Act were to become law without the inclusion of the remedial MBE provisions, the State would become a passive participant in any discrimination that exists in the industries involved in building and operating an offshore wind energy project. Finally, Dr. Jon Wainwright of NERA, an expert economist who conducted the State's 2011 disparity study, has provided a letter in which he concludes that there is a strong basis in fact to

support the State's desire to conduct a race-conscious remedial program in the area of offshore wind energy. *Letter of Dr. Jon Wainwright to Director Abigail Hopper* (Feb. 12, 2013) at 3-4. I believe that all of these factors, considered together, make it clear that the State has a compelling governmental interest that justifies the enactment of the bill's MBE provisions.

Finally, by referring to the State's existing MBE program, it is clear that the Offshore Wind Energy Act of 2013 envisions efforts to limit burdens on third parties, prohibits the use of quotas, makes waivers available for good faith efforts, and, authorizes only the type of flexible goals, applied on a contract-by-contract or project-by-project basis that this Office has long advocated as important to defending the constitutionality of MBE programs. Thus, it is our view that the MBE program contained in the Offshore Wind Energy Act of 2013 satisfies constitutional scrutiny.

Minority Business Outreach Program

The provisions of the Offshore Wind Energy Act of 2013 dealing with targeted outreach to minority investors, PU §7-704.1(D)(4), are also facially constitutional. In his concurrence in *Parents Involved*, Justice Kennedy specifically addressed the issue of race-conscious recruitment, among other race-conscious techniques, and wrote "it is unlikely any of them would demand strict scrutiny to be found permissible." 551 U.S. 701, 789 (2007). *See also H.B. Rowe v. Tippett*, 615 F.3d 233, 252 (4th Cir. 2010) (characterizing as "race neutral" North Carolina's decision to contract "for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development"); *Peightal v. Metropolitan Dade County*, 26 F.3d 1545, 1557-58 (11th Cir. 1994) (characterizing as "race-neutral" employee recruitment programs targeting minority college students and outreach programs); *but see Lutheran Church Missouri-Synod v. FCC*, 141 F.3d 344, *reh'g denied*, 154 F.3d 387 (D.C. Cir. 1998) (applying strict scrutiny to minority outreach program); *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, 20 (DC Cir. 2001) (same).

In the event that the minority outreach provision was subjected to strict scrutiny, however, it would still likely pass constitutional muster. First, there is a strong basis in evidence contained in the State's 2011 Disparity Study, of discrimination against minority and women contractors in the State contracting. This study examined most of the very industries that will be involved in the offshore wind program. Furthermore, the Study suggests that such discrimination is even greater in the prime contracting context than the subcontracting context. *Letter of Dr. Jon Wainwright to Director Abigail*

Hopper (Feb. 12, 2013) at 3-4. Second, the minority investor recruitment provisions are extremely narrowly tailored. The provisions impose little or no burden on innocent third parties, apply only if an applicant is seeking investors, require only that minority investors be solicited and interviewed, do not require that such investors be permitted to purchase an equity share in the project and involve absolutely no rigid numerical targets or goals. To limit the possibility of constitutional problems in the administration of the program, the State should take care to execute the provisions in a flexible and non-results-oriented way. For instance, as with other minority provisions, the State should not unilaterally assign any numerical goals or requirements as to the number of potential investors to be interviewed and should ensure that non-minorities are not excluded from the efforts of applicants to seek out investors. *See Lutheran Church Missouri-Synod v. FCC*, 141 F.3d 344 (DC Cir. 1998).

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

FEDERAL PREEMPTION – WAIVER OF STATE-IMPOSED FEDERAL PERMIT REQUIREMENT

Bill/Chapter: House Bill 986/Chapter 397 of 2013

Title: State Board of Pharmacy – Sterile Compounding – Permits

Attorney General's Letter: April 30, 2013

Issue: Whether a bill that allows a State board to waive a State-imposed federal permit requirement is preempted by federal law.

Synopsis: House Bill 986/Chapter 397 of 2013 makes a distinction between sterile compounding and preparing and distributing sterile drug products. The bill requires (1) a person engaging in sterile compounding to obtain a sterile processing permit issued by the Board of Pharmacy (board) and (2) a person engaging in the preparation and distribution of sterile drug products to obtain a permit issued by the Board of Pharmacy and an additional permit issued by the federal government. The bill also authorizes the State Board of Pharmacy to waive any of these requirements.

Discussion: The Attorney General cautioned that if House Bill 986 were construed to authorize the waiver of a federally imposed permit requirement, it would be subject to being preempted by federal law. By examining the legislative intent of House Bill 986, however, the Attorney General concluded that the bill was not intended to give the State Board of Pharmacy authority to waive federally imposed permit requirements. The intent was rather to give the board the authority to waive specific State-imposed requirements to obtain a specific federal permit. The Attorney General also noted that even a claim of waiver by the State board could not serve as a defense to enforcement by the federal government. With that comment, the Attorney General concluded that the bill was constitutional and legally sufficient.

Drafting Tips: **A drafter should always consider and understand the potential impact of federal law on legislation being drafted. Not only should the sponsor of the bill be apprised if a federal law expressly preempts State action in the area that is the subject of the bill, but it is a good practice to raise with the sponsor the possibility of preemption if the bill arguably could be seen as an obstacle to a federal requirement.**

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April 30, 2013

The Honorable Martin O'Malley
Governor of Maryland
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Annapolis, Maryland 21401-1991

Re: House Bill 986

Dear Governor O'Malley:

We have reviewed and hereby approve for legal sufficiency House Bill 986, titled "State Board of Pharmacy – Sterile Compounding – Permits." We write specially, however, regarding a provision of the bill that, if improperly construed, could be found to be preempted by federal law.

House Bill 986 amends the Maryland Pharmacy Act, imposing regulatory requirements with respect to the sterile preparation of drugs and related activities. The bill differentiates between two practices: "sterile compounding" and "prepar[ing] and distribut[ing] sterile drug products." *Compare* proposed Health Occupations Article § 12-4A-02(a) *with id.* § 12-4A-02(f). Both activities involve the preparation of drugs "using aseptic techniques," *see id.* § 12-4A-01(d)&(f), but "sterile drug product" is defined to mean "a drug product that . . . is not required to be prepared in response to a patient specific prescription," *id.* § 12-4A-01(f).

Proposed § 12-4A-02 of the Health Occupations Article would require a person engaging in "sterile compounding" to hold a sterile compounding permit issued by the Board of Pharmacy. Under subsection (f) of that provision, however, a person "prepar[ing] and distribut[ing] sterile drug products" – that is, preparing and distributing drug products other than in response to a "patient specific prescription" – would *not* be required to hold a sterile compounding permit, and would instead be required to hold both "a manufacturer's permit or other permit designated by the U.S. Food and Drug

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Administration to ensure the safety of sterile drug products" and "a wholesale distributor's permit issued by the Board [of Pharmacy]." *Id.* § 12-4A-02(f). In subsection (g), the bill goes on to provide that "[t]he Board may waive any requirement of this subtitle, *including the requirements of subsection (f)* . . . , in accordance with regulations adopted by the Board." *Id.* § 12-4A-02(g) (emphasis added).

Thus, House Bill 986 incorporates into State law (in subsection (f) of proposed § 12-4A-02) a requirement that a person preparing and distributing "sterile drug products" must obtain a permit from the federal government, while at the same time authorizing the Board of Pharmacy (in subsection (g)) to waive that State law requirement. Significantly, any such waiver would be for State law purposes only. The bill states that the Board may waive "the requirements of subsection (f)," not any permit requirement imposed by federal law itself. If subsection (g) were construed to authorize the waiver of any federally-imposed permit requirement, it would be subject to preemption.

Current federal law does not clearly differentiate between sterile compounding, which has traditionally been understood to be within the scope of pharmacy practice and subject to regulation by the states, and drug manufacturing, which is subject to substantial federal oversight. The boundary may be particularly difficult to discern where drugs are prepared in anticipation of, rather than in response to, patient specific prescriptions. Guidance from the Food and Drug Administration ("FDA") identifies, as among the factors that it will consider in determining whether to take enforcement action, whether the activity at issue involves "[c]ompounding in anticipation of receipt of a prescription, except in very limited quantities." FDA Compliance Policy Guide 460.200 (issued May 2002).

We expect the federal law to evolve in this area. In the meantime, a waiver by the Board of Pharmacy of the *State-imposed* federal permit requirement, as set forth in subsection (f) of proposed § 12-4A-02, would not function as a waiver of any requirement imposed by federal law itself. Such a waiver, therefore, could not serve as a defense to any enforcement action undertaken by the federal government.

With this comment, we find House Bill 986 to be constitutional and legally sufficient.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

Maryland Constitutional Issues

EQUAL RIGHTS – SEX-BASED DISCRIMINATION – COUPLES ADVANCING TOGETHER PILOT PROGRAM

Bill/Chapter: House Bill 333/Chapter 367 of 2013

Title: Family Investment Program – Couples Advancing Together Pilot Program

Attorney General's Letter: General Approval Letter dated April 15, 2013, footnote 16.

Issue: Whether a bill establishing a pilot program aimed at encouraging increased participation of fathers at the beginning of the process for determining eligibility for benefits under a Family Investment Program violates the sex equality requirement of the Maryland Constitution.

Synopsis: House Bill 333/Chapter 367 of 2013 requires the Department of Human Resources (DHR) to establish a "Couples Advancing Together" Pilot Program, aimed at helping couples qualifying for the Family Investment Program (FIP) to move toward stable relationships and family friendly employment. The program's objectives include encouraging the participation of fathers at the beginning of the process for determining the eligibility of a family or custodial parent for FIP benefits, unless DHR has reason to believe the father has a history of domestic violence.

Discussion: Article 46 of the Maryland Declaration of Rights states that "[e]quality of rights under the law shall not be abridged or denied because of sex." The Attorney General concluded that the provisions of House Bill 333 aimed specifically at "fathers" were inconsistent with this requirement because the provisions were based on sex-based stereotyping. The Attorney General advised DHR to implement the bill as though it required the pilot program to encourage increased participation by both parents at the beginning of the FIP eligibility process and recommended that the provision be corrected in next year's corrective bill.

Drafting Tips: **When drafting bills establishing programs aimed at family units, a drafter should be mindful of the Maryland Declaration of Rights' equal protection requirements. Avoidance of policies that discriminate on the basis of sex and use of gender-neutral language may help insulate legislation from a constitutional challenge on those grounds.**

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 15, 2013

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

SENATE	HOUSE
SB 42[1]	HB 9[6]
SB 59	HB 43[2]
SB 69	HB 57[4]
SB 80	HB 77
SB 87	HB 167[1]
SB 124[2]	HB 179[7]
SB 175	HB 301
SB 230	HB 305[9]
SB 304	HB 319[8]
SB 351[3]	HB 333[16]

1 SB 42 is identical to HB 167.
2 SB 124 is identical to HB 43.
3 SB 351 is identical to HB 459.

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SENATE	HOUSE
SB 355[4]	HB 459[3]
SB 374	HB 555
SB 380[5]	HB 795[10]
SB 390[6]	HB 932[12]
SB 401[7]	HB 1055
SB 428[8]	HB 1084[11]
SB 429[9]	HB 1090[13]
SB 481	HB 1146
SB 729	HB 1160[14]
SB 757[10]	HB 1220
SB 774	HB 1343[5]
SB 790	HB 1387[15]
SB 797[11]	HB 1431
SB 832[12]	
SB 849[13]	
SB 904[14]	
SB 916	
SB 926	

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4 SB 355 is identical to HB 57.
5 SB 380 is identical to HB 1343.
6 SB 390 is identical to HB 9.
7 SB 401 is identical to HB 179.
8 SB 428 is identical to HB 319.
9 SB 429 is identical to HB 305.
10 SB 757 is identical to HB 795.
11 SB 797 is identical to HB 1084.
12 SB 832 is identical to HB 932.
13 SB 849 is identical to HB 1090.
14 SB 904 is identical to HB 1160.

SENATE

SB 957[15]

SB 963

SB 1026

SB 1049

SB 1067

SB 1068

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/mb

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

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15 SB 957 is identical to HB 1387.

16 HB 333 establishes a "Couples Advancing Together" pilot program within the Department of Human Services. Among the objectives of the pilot program is the "IMPLEMENTATION OF POLICIES AND PROCEDURES IN THE LOCAL DEPARTMENT THAT ENCOURAGE INCREASED PARTICIPATION OF ***FATHERS*** AT THE BEGINNING OF THE PROCESS FOR DETERMINING THE ELIGIBILITY OF A FAMILY OR CUSTODIAL PARENT FOR F[amily] I[nvestment] P[rogram] BENEFITS, INCLUDING TEMPORARY CASH ASSISTANCE, UNLESS THE DEPARTMENT HAS REASON TO BELIEVE THE ***FATHER*** HAS A HISTORY OF DOMESTIC VIOLENCE." HS § 5 318.1(c)(1) (emphasis added). It is important that the law and its implementation reflect the mandate of Article 46 of the Maryland Declaration of Rights, that "[e]quality of rights under the law shall not be abridged or denied because of sex." Our law cannot be based on sex-based stereotyping. Thus, we encourage the Department to implement this provision as if it required the pilot program to encourage increased participation by both parents at the beginning of the FIP eligibility process unless either parent has a history of domestic violence. Moreover, we strongly recommend that this provision be corrected to fix these references in next year's corrective bill.

SEPARATION OF POWERS – DUAL OFFICES – MARYLAND VETERANS TRUST

Bill/Chapter: House Bill 1390/Chapter 681 of 2013

Title: Maryland Veterans Trust and Fund – Establishment

Attorney General's Letter: May 8, 2013

Issue: Whether a bill that includes members of the General Assembly on the board of trustees of a trust established to provide monetary and other assistance to veterans and their families violates the separation of powers provisions of Article 8 of the Maryland Declaration of Rights or the prohibition against dual office holding found in Article III, § 11 of the Maryland Constitution.

Synopsis: House Bill 1390/Chapter 681 of 2013 establishes the Maryland Veterans Trust (trust) to provide monetary and other assistance to veterans and their families and public and private programs that support veterans and their families. The legislation also establishes an 11-member board of trustees that includes two members of the General Assembly to exercise specified powers and duties of the trust.

Discussion: Article 8 of the Maryland Declaration of Rights provides that "the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other" and that "no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." The Attorney General noted that this separation of powers provision has been described by the Maryland Court of Appeals as "somewhat elastic." This flexibility, however, has never been interpreted to extend to the core functions of the respective branches of government.

The Attorney General noted that the board would be performing a core Executive Branch function if it enters into binding contracts on behalf of the State, a function that the legislator members of the board may not exercise, either individually or as members of the board.

Article III, § 11 of the Maryland Constitution provides, moreover, that "[n]o person holding any civil office of profit, or trust, under this State shall be eligible as Senator or Delegate." Of particular significance is whether service on the board constitutes holding an "office of . . . trust" that would conflict with being a legislator. In making this determination courts consider the following five factors, viewing the third factor as most important and the fifth factor as least important:

(1) whether the position was created by law and casts upon the incumbent duties which are continuing in nature and not occasional;

(2) whether the incumbent performs an important public duty;

(3) whether the position calls for the exercise of some portion of the sovereign power of the State;

(4) whether the position has a definite term, for which a commission is issued, a bond required, and an oath required; and

(5) whether the position is one of dignity and importance.

Applying these factors, the Attorney General determined that service on the board would be found to be an "office of trust" that is incompatible with simultaneous service in the General Assembly. Under the legislation, significant powers and responsibilities of the trustees involve the performance of important public duties on a continuing basis and the exercise of some part of the sovereign power of the State. The duties include soliciting and accepting gifts, grants, legacies, or endowments of money; maintaining the trust; expending money from the trust; entering into contracts; receiving appropriations; acquiring, holding, using, improving, and conveying property; leasing and maintaining an office; and suing and being sued. The Attorney General concluded that none of these actions could be properly taken with the participation of the members of the General Assembly. The Attorney General suggested that the Governor could veto the bill, sign it without making the legislative appointments, or sign it and make the appointments with the understanding that the legislators would not participate in most of the board's actions and be treated as *ex officio*, nonvoting members.

Drafting Tips: **When drafting legislation that grants powers or assigns responsibilities to a board, commission, council, or task force on which a member of the General Assembly will serve, the drafter should consider potential separation of powers and dual office holding issues. If the legislation would result in legislators performing core Executive Branch functions or important public duties on a continuing basis and the exercise of some part of the sovereign power of the State, the drafter should alert the sponsor to the potential constitutional problems and advise the sponsor to consider removing the legislative members from the legislation.**

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 8, 2013

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

Re: House Bill 1390, "Maryland Veterans Trust and Fund – Establishment"

Dear Governor O'Malley:

We have reviewed House Bill 1390, "Maryland Veterans Trust and Fund – Establishment" for constitutionality and legal sufficiency. While the bill may be signed, we write to address constitutional issues raised by the bill.

House Bill 1390 would establish the Maryland Veterans Trust Fund ("Fund") and the Maryland Veterans Trust ("Trust") with a Board of Trustees ("Board") that includes two members of the General Assembly. This Office has previously advised that having members of the General Assembly serve on Executive Branch boards could violate the separation of powers of Article 8 of the Maryland Declaration of Rights or cause a violation of the prohibition against dual office holding found in Article III, § 11 of the Maryland Constitution. *See e.g.* Bill Review letter on HB 944/SB 367, "Commission on the Establishment of a Maryland Women in Military Service Monument," dated May 15, 2009, a copy of which is attached.

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The inclusion of members of the General Assembly on the Board raises the very same issues discussed in our 2009 letter. Further, the significant powers and responsibilities of the Trustees under §9–914.2 involve the performance of important public duties on a continuing basis and the exercise of some part of the sovereign power of the State. They include, but are not limited to: soliciting and accepting any gift, grant, legacy, or endowment of money; maintaining the Fund; expending money from the Fund; entering into contracts; receiving appropriations; acquiring, holding, using, improving and conveying property; leasing and maintaining an office; and suing and being sued. *Id.* In our view, none of the above actions could be taken with the participation of the members of the General Assembly.

There are several courses of action that may be taken. You may veto the bill, and introduce a new bill during the next session that does not include members of the General Assembly on the Board. You may sign the bill, but not appoint the legislative members. The Board would then be able to exercise any and all of its enumerated powers. If you choose this option, we recommend legislation next year to remove the legislative members from the statute. Finally, you may sign the bill and appoint the legislative members, who would be prohibited from participating in most of the Board's actions. It is our recommendation that if this course is taken, the legislative members not take an oath and be treated as ex officio, non-voting members.

We also note that the Fiscal Note for House Bill 1390 says that "[a]ccording to MDVA, the bill is necessary so that the fund may be converted into a nonprofit, tax-exempt (501(c)(3)) organization. The fund cannot legally apply for 501(c)(3) status as part of a State agency." Please be advised that only the Internal Revenue Service can determine whether a particular organization is eligible for exemption under § 501(c)(3) of the Internal Revenue Code. We note, that in general, to obtain § 501(c)(3) status, the IRS will require the Trust to establish that it is not an "integral part" of the State government. If 501(c)(3) status is denied, future legislation may be required to conform to IRS requirements.

Finally, under Section 3 of the bill, Section 2, relating to the income tax checkoff system, is contingent on the enactment of HB 750. Because HB 750 did not pass, even if HB 1390 is signed into law, Section 2 will be null and void.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/BAK/kk

cc: The Honorable Peter A. Hammen
The Honorable John P. McDonough
Stacy Mayer
Karl Aro

DELEGATION OF LEGISLATIVE AUTHORITY – SUSPENDING THE EXECUTION OF LAWS – AGRICULTURAL CERTAINTY AGREEMENTS

Bill/Chapter: Senate Bill 1029/Chapter 339 of 2013

Title: Maryland Agricultural Certainty Program

Attorney General's Letter: General Approval Letter dated April 19, 2013, footnote 12, citing advice letter (discussed below) dated April 5, 2013.

Issue: Whether a bill authorizing an entity that complies with or exceeds certain current environmental laws to enter into a "certainty agreement" with a State agency that exempts the entity from complying with certain future laws is an unconstitutional "entrenching provision" binding future legislatures or is a violation of the constitutional prohibition against suspending the execution of laws.

Synopsis: Senate Bill 1029/Chapter 339 of 2013 establishes a voluntary Agricultural Certainty Program within the Maryland Department of Agriculture (MDA). The program allows a farm that complies with or exceeds current environmental laws to enter into a 10-year "certainty agreement" with MDA. During the term of the certainty agreement, the farm would not have to comply with certain newly enacted local or State environmental laws or regulations.

Discussion: The Attorney General first considered whether Senate Bill 1029 was an unconstitutional "entrenching provision" – *i.e.*, part of a law that makes it difficult to change the law in the future. The Attorney General concluded that a bill that authorizes MDA to enter into certainty agreements does not violate the principle against entrenching provisions because the bill does not place any limitations on legislation future legislatures may pass.

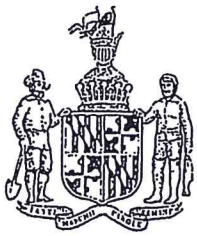
Article 9 of the Maryland Declaration of Rights provides that, while it is generally unconstitutional to suspend the execution of laws, it may be done so by or with the power derived from the legislature. The Attorney General concluded that the legislature has the ability to not only control enforcement activities of local governments, but also to exempt certain entities from the application of environmental law. The Attorney General then reasoned that if the legislature has the power to provide for these exemptions, then the legislature could delegate that power to MDA.

Drafting Tips: **A drafter should take care to ensure that a bill's provisions cannot be interpreted to put limits on legislation future legislatures may pass. When drafting legislation that authorizes a government body to exempt certain entities from the application of certain laws, the drafter should make sure that the legislature has statutory authority to provide for those exemptions as well as the power to delegate the authority to another party.**

DOUGLAS F. GANSLER
ATTORNEY GENERAL

KATHERINE WINFREE
Chief Deputy Attorney General

JOHN B. HOWARD, JR.
Deputy Attorney General



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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 19, 2013

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

SENATE	HOUSE
SB 54[1]	HB 207
SB 161[2]	HB 232

[1] SB 54 and HB 963 both amend ED § 18-601, but in different ways. SB 54 is a departmental bill to make technical changes to various scholarship programs, including the Edward T. Conroy Memorial Scholarship Program, to address issues raised in the bill review letter on SB 365, dated May 10, 2012, a copy of which is attached. HB 963 creates a new scholarship program, the Jean B. Cryor Memorial Scholarship Program, to be added into the same statute that creates the Conroy Program. SB 54 defines "Fund" to mean the Edward T. Conroy Scholarship Fund. HB 963 contains no definition of "Fund." SB 54 does not amend ED § 18-601(c), whereas HB 963 does amend subsection (c) to incorporate the newly created Cryor Program. HB 963 amends subsection (d) to add eligibility criteria relating to school employees, a newly defined term in HB 963. Both bills amend subsection (h) to create the Fund, with SB 54 limited to the Conroy Scholarship Fund. SB 54 also includes a provision requiring the Maryland Higher Education Commission to administer the Fund, whereas HB 963 does not include this provision. Most of the changes made by these two bills may be read together and incorporated into ED § 18-601 without conflict. To resolve any conflicting provisions, however, we recommend that HB 963 be signed after SB 54.

[2] SB 161 is nearly identical to HB 286. In the lead-in to new subsection (d)(2) of SB 161, however, the word "member" was inadvertently left in the bill; it was deleted in other instances in both bills. Thus, if you wish to sign both bills, we recommend that HB 286 be signed after SB 161.

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SENATE	HOUSE
SB 188[3]	HB 286[2]
SB 404[4]	HB 408[4]
SB 477[5]	HB 419
SB 501[6]	HB 489
SB 582[7]	HB 494[5]
SB 595[8]	HB 585[9]
SB 599[9]	HB 591[8]

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[3] SB 188 is substantively identical to HB 1353. In the purpose paragraph on page 1, HB 1353 includes "is required" in line 20 and "and submit a certain report to the Legislative Policy Committee of the General Assembly" in lines 21-22, neither of which are in SB 188. While the language in HB 1353 is more grammatically correct and more inclusive, in our view both titles are adequate and either or both bills may be signed.

[4] SB 404 is identical to HB 408.

[5] SB 477 is identical to HB 494.

[6] SB 501 is identical to HB 624.

[7] SB 582 is identical to HB 1252.

[8] SB 595 is identical to HB 591.

[9] SB 599 is identical to HB 585.

SENATE	HOUSE
SB 690[10]	HB 624[6]
SB 736	HB 650
SB 811[11]	HB 695
SB 1028	HB 877[11]
SB 1029[12]	HB 900[10]
	HB 963[1]
	HB 1252[7]
	HB 1353[3]

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[10] SB 690 and HB 900 are identical. The bills alter the penalties for misrepresentation of oneself as a physician, which is currently a misdemeanor punishable by a $5,000 fine or imprisonment not exceeding 5 years or both, making the offense a felony subject to a fine of up to $10,000 or imprisonment not exceeding 5 years or both. The bills also alter a defense to a charge of practicing medicine, attempting to practice medicine, or offering to practice medicine unless the person is licensed. Under current law, the provision against unlicensed practice does not apply to "a licensee who has failed to renew a license under § 14-316 of this title." Under the bills, the defense is made applicable both to a charge of unlicensed practice and to a charge of misrepresentation, but is limited to persons whose licenses have been expired for less than 60 days and who have applied for license renewal, including payment of the renewal fee. The bills do not make it illegal to fail to renew a license, but to practice medicine or represent oneself as a physician without renewing the license within a reasonable amount of time. The title to the bills, however, reflects that the bills "[alter] the penalties to which a person is subject if the person fails to renew a license to practice medicine or misrepresents to the public that the person is authorized to practice medicine in the State." While this description is not completely accurate, the title also provides that it is "generally relating to penalties for violation of the laws governing the practice of medicine in the State." It is our view that this aspect of the title, while not perfect, adequately describes the contents of the bills. As a result it is our view that the suggestion that the bills make it illegal for a physician not to renew a license may be treated as surplusage, and that the bills may be signed into law.

[11] SB 811 is identical to HB 877.

[12] By letter dated April 5, 2013, this office advised Delegate C. William Frick that, in our view, SB 1029 is constitutional. A copy of that letter of advice is attached. Although minor changes were made to the bill after our advice was issued, those changes do not cause us to revise our conclusions.

Very truly yours,

Douglas F. Gansler
Attorney General

Attachments

DFG/DF/mb

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

DOUGLAS F. GANSLER
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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 5, 2013

The Honorable C. William Frick
Maryland House of Delegates
House Office Building, Room 219
Annapolis, Maryland 21401

Re: Senate Bill 1029, "Maryland Agricultural Certainty Program"

Dear Delegate Frick:

You have asked for my confidential legal advice on Senate Bill 1029, the "Maryland Agricultural Certainty Program." The thrust of Senate Bill 1029 is to create a voluntary Agricultural Certainty Program, whereby a farm that complies with or exceeds certain *current* environmental laws may apply for a 10-year certification during which it would not have to comply with certain *new* state or local environmental laws or regulations enumerated in the Bill. At the end of the 10-year certification, the farm would have to bring itself into compliance with then-current laws, but then could be recertified for another 10-year period. It is my view that the bill is constitutional.

I have reproduced your specific questions and provided answers below.

1. Is SB 1029 an unconstitutional "entrenching provision"?

An 'entrenching provision' is a law or a part of a law that purports to make it more difficult to change the law in the future. Thus, for example, it would be unconstitutional for the legislature to attempt by legislation to change the number of votes necessary to pass or repeal a law. *Letter of Advice to the Hon. Sheila Hixson from Assistant Attorney General Bonnie A. Kirkland* (Jan. 11, 2012) (hereinafter, "*Hixson Letter*"). It would similarly be improper "entrenching" if the current legislature purported to bind a future legislature.[1] The United States Supreme Court has, with respect to the federal Congress,

[1] While an entrenching provision contrary to an express provision of the Maryland Constitution would be unconstitutional, *see Hixson Letter*, I think our Office would not ordinarily say that an effort at entrenchment would be unconstitutional but rather we would say that the entrenching provision was unenforceable against that future legislature. *See generally*

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frequently stated this principle. *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 873 (1996) ("a general law ... may be repealed, amended or disregarded by the legislatures which enacted it," and "is not binding upon any subsequent legislature") (quoting *Manigault v. Springs*, 199 U.S. 473, 487 (1905)); *Fletcher v. Peck*, 10 U.S. 87 (1810) (acknowledging the principle "that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature"). The same principle applies to state legislatures. *Nebraska ex rel. Stenberg v. Moore*, 544 N.W.2d 344 (Neb. 1996); *Frost v. Iowa*, 172 N.W.2d 575 (Iowa 1969); *Village of North Atlanta v. Cook*, 133 S.E.2d 585 (Ga. 1963); *Atlas v. Board of Auditors*, 275 N.W. 507 (Mich. 1937). It cannot be otherwise, or we would, in effect, be saying that a future legislature has less sovereignty than the current.

It is my view, however, that SB 1029 does not violate this principle. There is no limitation in the bill on the legislation that a future legislature may pass, including more stringent environmental rules or even repealing SB 1029. Thus, it is my view that the bill does not violate this anti-entrenchment principle.

2. Is it legal for one legislature to bind a future legislature?

As described above, in response to Question #1, it is my view that SB 1029 does not bind a future legislature.

Rather, the way that SB 1029 operates is to authorize the Maryland Department of Agriculture ("MDA") to enter into "certainty agreements" pursuant to which, in exchange for voluntary compliance with certain environmental standards that might not otherwise apply, MDA agrees not to prosecute a farm for violation of any subsequently adopted environmental standards. Thus, the proper legal question is whether the legislature can authorize MDA, on behalf of itself and other State agencies and local governments, to contract not to enforce a subsequently adopted law.

It is my view, that the legislature can authorize MDA to enter into such contracts. At the outset, there can be no doubt about the legislature's ability to control the enforcement activities of local governments. Second, while it is generally unconstitutional to "suspend[] Laws or the execution of Laws," they may be suspended "by, or [with power] derived from the Legislature." Md. Const., Decl. of Rts., Art. 9. Here, it is clear that MDA's decision to enter into the "certainty agreements" is derived

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Stewart E. Sterk, *Retrenchment on Entrenchment*, 71 Geo. Wash. L. Rev. 231 (2003) (describing academic debate regarding prohibition against entrenchment).

from a power granted by the legislature. Third, it is also clear that prosecutors are empowered with substantial discretion whether or not to prosecute crimes, including environmental violations, and whether or not to settle, on what terms. It seems to me that the decision to enter into a "certainty agreement" is a manner by which MDA can legitimately channel its prosecutorial discretion. Fourth, the legislature clearly has the power (subject to constitutional limitations) to exempt certain entities from the application of an environmental law. *See, e.g.*, Md. Envir. ("EN") Ann. Code, §4-413(b) ("If a person engaging in agricultural land management practices without a district approved soil conservation and water quality plan complies with an order for corrective action ..., that person shall not be subject to penalties"); EN §6-825(i) ("if the [Maryland] Department [of the Environment] approves a compliance plan, an affected property shall be considered in compliance with §§6-815, 6-817, and 6-819 of this subtitle as of the day of the date of transfer"). If the General Assembly can accomplish these exemptions legislatively, it should be able to accomplish the same purpose by delegating the power to grant exemptions (based on carefully listed criteria) to MDA. Therefore, it is my view that it is not clearly unconstitutional for the legislature to authorize MDA to enter into these "certainty agreements."

The foregoing discussion leads, however, to one additional inquiry: if a future legislature passes new environmental legislation that places new obligations on a party to a certainty agreement, and that new obligation in effect abrogates the terms of the certainty agreement,[2] would that unconstitutionally impair the contract in violation of the Constitution? In my view, it would not.

The Contract Clause of the U.S. Constitution, art. I, §10, is not an absolute prohibition on the impairment of the obligations of contract. *See U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977). Rather, for a court to find an unconstitutional impairment of public contract, a litigant has the burden of showing: (1) the existence of a valid contract; (2) which the State has not reserved the power to amend or repeal; (3) whose scope or terms have not been limited by the "law of the place," *i.e.* the relevant constitutional provisions, statutes and case law implicitly incorporated into the contract at the time it was made; (4) and which has been substantially and retroactively impaired by legislation upsetting the reasonable expectations of the parties. *See, e.g., MSTA v. Hughes*, 594 F.Supp. 1353, 1359-1361 (D. Md. 1984). Here, the fourth factor—substantiality of

[2] For example, the legislature could pass a new law that, "notwithstanding" this law or the existence of certainty agreements, farm operators must comply with a new environmental law.

impairment—is likely to be most relevant. But even if all four factors are met, the State can still justify its actions if the impairment is reasonable and necessary to serve an important public purpose. *United States Trust Co. v. New Jersey*, 431 U.S. at 26.

Although I don't have a crystal ball, I think it is unlikely that a reviewing court will find this hypothetical subsequently-adopted environmental legislation applied to parties to certainty agreements to be a "substantial" impairment such as to require invalidation. *See Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 413 (1983). Although one consideration is the impact of the change in law (about which I cannot foresee), the other considerations, including reasonable expectation of the parties, the existence of prior state regulation, and the foreseeability of future state regulation, all suggest that this would not be a "substantial" impairment. *Id* at 413-16. Moreover, the adoption of this hypothetical new law, I would argue, indicates that the legislature found an important public purpose in its enactment. Thus, it is my view that despite the existence of these "certainty agreements" a future legislature may add obligations without unconstitutionally impairing these contracts.

I hope that this analysis will assist you with your deliberations.

Very truly yours,

Dan Friedman
Counsel to the General Assembly

APPROPRIATIONS – REQUIREMENTS FOR FUNDING MANDATES

Bill/Chapter: Senate Bill 828/Chapter 563 and House Bill 831/Chapter 564 of 2013

Title: St. Mary's College of Maryland – Tuition Freeze and DeSousa-Brent Scholars Completion Grant

Attorney General's Letter: General Approval Letter dated April 18, 2013, footnote 8.

Issue: Whether a bill that purports to require an appropriation in the budget for the fiscal year already under consideration is binding on the Governor.

Synopsis: Senate Bill 828/Chapter 563 and House Bill 831/Chapter 564 of 2013 freeze the undergraduate resident tuition at St. Mary's College of Maryland (SMCM) and require the Governor to appropriate $800,000 for SMCM from the Higher Education Investment Fund (HEIF) in fiscal 2014 and $1.6 million in fiscal 2015. Beginning in fiscal 2016, the general fund appropriation for SMCM must include the fiscal 2015 appropriation from this grant. In addition, the bills require the Governor to appropriate from HEIF $300,000 in fiscal 2014, $550,000 in fiscal 2015, and $800,000 in fiscal 2016 through 2019 for DeSousa-Brent Scholars grants.

Discussion: A mandate is a legal requirement for the Governor to include certain levels of funding for specific programs and purposes in the budget as introduced. Article III, § 52 (11) of the Maryland Constitution requires that legislation imposing mandated funding levels must be enacted prior to July 1 of the fiscal year that precedes the fiscal year to which the requirement applies.

The Attorney General advised that the Governor is not required to provide for the $1.1 million of appropriations in fiscal 2014 because the requirement does not constitute a funding mandate under Article III, § 52 (11) of the Maryland Constitution. Because the General Assembly under Maryland Constitution, Article III, § 52 may not mandate an appropriation for a fiscal year that is the subject of the budget then under consideration, the Attorney General concluded that the Governor was permitted, but not obligated, to provide the appropriation.

Drafting Tips: **A drafter should be aware that the Maryland Constitution provides specific requirements for how the General Assembly may appropriate money that disallows the General Assembly from mandating an appropriation in the same fiscal year that is the subject of the budget then under consideration. A purported appropriation that violates this constitutional restraint will be considered merely optional for the Governor. The drafter should discuss this issue with the sponsor if proposed legislation seeks to appropriate money in this manner.**

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ATTORNEY GENERAL

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 18, 2013

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

SENATE	HOUSE
SB 195[1]	HB 637
SB 339[2]	HB 718[7]
SB 573[3]	HB 753[2]
SB 750[4]	HB 769[4]
SB 761[5]	HB 778[9]

[1] SB 195 is nearly identical to HB 1062. SB 195 contains an additional phrase in lines 5-6 of the purpose paragraph relating to the required notice under the bills. In our view, both purpose paragraphs are adequate and either bill or both bills may be signed.

[2] SB 339 and HB 753 are nearly identical. SB 339 repeals the text of TR §21-1124.2(e) but leaves "(e)," whereas HB 753 places a bracket around current "(f)," thereby renumbering "(f)" to be "(e)" and renumbers "(g)" to be "(f)." But HB 753 does not amend the cross reference to (f) currently found in (g). Either or both may be signed into law. If SB 339 is signed last, the publisher can designate (e) as "reserved" or renumber "(f)" and "(g)" to be "(e)" and "(f)," respectively. The cross-reference may be corrected in next year's corrective bill.

[3] SB 573 and HB 1190 are effectively identical, even though HB 1190 shows the entire TP § 6-302 and SB 573 only shows subsection (b) of that section.

[4] SB 750 is identical to HB 769.

[5] SB 761 is identical to HB 868. 99

SENATE	HOUSE
SB 766[6]	HB 828[6]
SB 813[7]	HB 831[8]
SB 828[8]	HB 854
SB 899[9]	HB 868[5]
SB 951[10]	HB 879[10]
SB 969[11]	HB 909
SB 1064[12]	HB 935
	HB 1030
	HB 1062[1]
	HB 1190[3]
	HB 1413[11]
	HB 1515
	HB 1534[12]

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6 SB 766 is identical to HB 828.

7 SB 813 is identical to HB 718.

8 SB 828 and HB 831 are identical bills that freeze the undergraduate resident tuition at St. Mary's College and require the Governor to appropriate $800,000 from the Higher Education Investment Fund ("HEIF") in FY14 and $1.6 million in FY15. The bills also require the Governor to appropriate from HEIF $300,000 in FY14, $550,000 in FY15; and $800,000 in FY16 through FY19 for DeSousa-Brent Scholars grants. Under §52(11) of the Executive Budget Amendment to the Maryland Constitution, the General Assembly may only mandate spending "by a law which will be in effect during the fiscal year covered by the Budget and which was enacted before July 1 of the fiscal year prior to that date . . ." SB 828/HB 831 purports to require a total of $1.1 million of appropriations in the FY14 Budget Bill, i.e., the Budget that was under consideration during the 2013 Session. While the General Assembly may mandate an appropriation for FY15 and beyond, it may not mandate an appropriation for FY14 through a law enacted during the 2013 Session. Thus, the Governor is permitted but not obligated to provide for a FY14 appropriation to satisfy the requirements contained in SB 828/HB 831.

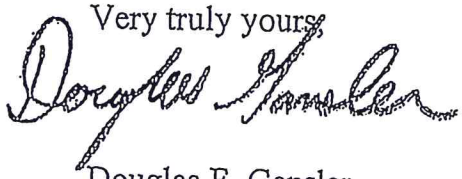
9 SB 899 is identical to HB 778.

10 SB 951 is identical to HB 879.

11 SB 969 is identical to HB 1413.

12 SB 1064 is identical to HB 1534.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/mb

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

SINGLE-SUBJECT RULE – ALCOHOLIC BEVERAGES – AUTHORIZED NUMBER OF AND GEOGRAPHIC LIMITATIONS ON LICENSES

Bill/Chapter: House Bill 1082/Chapter 400 of 2013

Title: Prince George's County – Alcoholic Beverages – Class A Licenses and Class B-AE Licenses

Attorney General's Letter: April 30, 2013

Issue: Whether a bill with an amendment prohibiting certain alcoholic beverage licenses from being issued or transferred to a location within a specified distance of a correctional facility violates the single subject requirement of the Maryland Constitution when (1) the bill, as introduced, merely increased the number of different specified classes of licenses that may be issued in the jurisdiction and (2) another bill with language similar to the amendment died in the legislative process.

Synopsis: House Bill 1082/Chapter 400 of 2013 increases the number of Class B-AE (arts and entertainment) beer, wine, and liquor licenses that can be issued in Prince George's County. The bill was amended to also prohibit the Board of License Commissioners from issuing a new Class A license, or transferring an existing Class A license, to a location within three-fourths of a mile of a correctional facility in Upper Marlboro.

Discussion: Under Article III, § 29 of the Maryland Constitution, a bill may embrace only "one subject." An act meets the single-subject requirement of § 29 if the act's several sections refer to and are germane (*i.e.,* connected, related, pertinent) to the same subject-matter.

Citing precedent, the Attorney General first noted that the purpose of the single-subject rule is to prevent the combination in one bill of totally unrelated matters that would not receive support if offered independently. The rule helps avoid the necessity for a legislator to acquiesce in a bill he or she opposes in order to secure useful and necessary legislation and protects a governor's veto power.

Reviewing the legislative history of House Bill 1082, the Attorney General observed that the bill initially authorized the issuance of additional B-AE beer, wine, and liquor licenses and was then amended in the Senate to prohibit the issuance or transfer of a Class A license within three-fourths of a mile of a correctional facility in Upper Marlboro.[2] This

[2] The bill also initially authorized additional BCE (catering) beer, wine, and liquor licenses, but was amended in the House to eliminate the additional BCE licenses.

amendment is similar to language that would have been added by House Bill 1456 of 2013, a bill that did not receive a hearing in the Economic Matters Committee due to its untimely return to the committee by the county delegation.

The Attorney General concluded that the bill as amended does not violate the single-subject requirement of the Maryland Constitution. The Attorney General noted that the initial provisions and the added provisions in the bill both address the issuance of alcoholic beverages licenses in Prince Georges County and the geographic areas in which they may be issued. A Class B-AE license may be issued only for an establishment in an arts and entertainment district and, under the amendment, a Class A license may not be issued within a certain distance of a correctional facility in Upper Marlboro.

The Attorney General concluded that there was no evidence that the Senate amendment implicated the purposes of the single-subject requirement. The Attorney General noted that the amendment had the unanimous support of the county delegation in the Senate and that the delegation concurred in the House. In addition, no votes were cast against the bill in committee or on the floor in either house either before or after the amendment, and the amendment was fully explained on the floor of the House before concurrence. The Attorney General also found that it was of little significance that the similar bill died in the legislative process since that legislation was not considered on its merits.

Drafting Tips: **When asked to draft an amendment that embraces different subject matter than provisions already included in a bill, the drafter should advise the amendment's sponsor that the added language may violate the single-subject requirement of the Maryland Constitution. The drafter should remind the sponsor of the purpose of the single-subject rule, which is to prevent the combination in one bill of totally unrelated matters, particularly if the addition would not receive support if offered independently.**

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 30, 2013

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

Re: House Bill 1082

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency, House Bill 1082, "Prince George's County - Alcoholic Beverages - Class A Licenses and Class B-AE Licenses." In approving the bill, we have concluded that the addition of provisions concerning the issuance of Class A licenses within a certain distance of a correctional facility did not violate the single subject requirement of Maryland Constitution, Article III, § 29.

As introduced, House Bill 1082 authorized the issuance of additional BCE (catering) beer, wine, and liquor licenses and B-AE (arts and entertainment) beer, wine, and liquor licenses. The bill was amended in the House to eliminate the additional BCE licenses and to decrease the number of additional B-AE licenses. The bill was amended in the Senate to prohibit the issuance or transfer of a Class A license to a location within three-fourths of a mile of a correctional facility located in Upper Marlboro. This provision is similar to language that would have been added by House Bill 1456 of this session, which did not receive a hearing in the Economic Matters Committee because it was not timely returned to the committee by the County Delegation.

Both portions of House Bill 1082 address the issuance of alcoholic beverages licenses in Prince George's County, and the geographic areas in which they may be issued. A Class B-AE license may be issued only for an establishment located in an arts and entertainment district approved by the County Council, and the bill permits the issuance of more of them, presumably to aid in the further development of these areas

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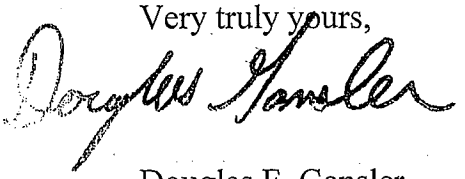
consistent with their purpose. It also prohibits the issuance of a Class A license within three-fourths of a mile of a correctional facility in Upper Marlboro. It is my understanding that this restriction is aimed at a shopping center near the jail which has a bus stop where released inmates go to catch the bus. The concern was raised that having a liquor store at that location could lead to undesirable results.

We also find no evidence that the addition of the new provision would implicate the purposes of the single subject requirement, which are to prevent logrolling and also to protect the Governor's veto power. *Porten Sullivan Corp. v. State*, 318 Md. 387, 403 (1990). The Senate amendment had the unanimous support of the County Delegation in the Senate and the delegation concurred in the House. No votes were cast against the bill in committee or on the floor in either house either before or after the amendment. In addition, the amendment was fully explained on the floor of the House before concurrence. Finally, while the fact that a similar bill had died can be relevant to the issue of whether the single subject requirement has been violated, it is our view that this factor carries little weight where, as here, the bill was not considered on the merits.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

SINGLE-SUBJECT RULE – WEAKLY RELATED PROVISIONS

Bill/Chapter: House Bill 1292/Chapter 411 of 2013

Title: Calvert County – Alcoholic Beverages Licenses and Appeals

Attorney General's Letter: April 22, 2013

Issue: Whether a bill that both authorizes issuance of a certain type of alcoholic beverages license in a county and also adds that county to the list of counties where a circuit court may remand certain proceedings concerning alcoholic beverages to the local licensing board violates the single-subject requirement of Maryland Constitution Article III, § 29.

Synopsis: As originally introduced, House Bill 1292/Chapter 411 of 2013 authorized the Calvert County Board of License Commissioners to issue a continuing care retirement community on-sale beer, wine, and liquor license to a club at a retirement community that meets specified requirements. The bill was subsequently amended to add Calvert County to the list of jurisdictions in which a circuit court may return certain decisions relating to alcoholic beverage licenses to a local licensing board for further consideration.

Discussion: Maryland Constitution Article III, § 29 requires that each law enacted by the General Assembly embrace only one subject, which must be described in the law's title. The Attorney General determined that, although the link between the licensing and appeals provisions in House Bill 1292 "could be stronger," the bill, nevertheless, satisfied the single-subject requirement because both provisions relate to the regulation of alcoholic beverages in Calvert County.

The purposes of the single-subject requirement are to prevent "logrolling" and to protect the Governor's veto power. Under Maryland case law, the analysis of whether a bill that contains two tenuously related provisions crosses the line into having two subjects depends on whether the bill implicates the purposes of the single-subject requirement. Factors relevant to this determination include (1) whether any language added by amendment was the subject of an earlier bill; (2) whether all provisions were fully explained in both houses; and (3) whether any provision was particularly controversial during the bill's consideration.

Applying these criteria, the Attorney General found that both provisions of House Bill 1292 were fully explained in both houses, as well as to the bill's sponsor. There were no votes against the bill, and no one testified against the bill or its amendment. Under these circumstances, the

Attorney General concluded that the bill was consistent with the intent of the single-subject rule.

Drafting Tips: **If asked to draft an amendment to a bill that adds a provision only tenuously related to the bill's original subject matter, a drafter should advise the sponsor that the amendment may violate the single-subject rule of the Maryland Constitution. A weak link is more likely to be acceptable if the amendment is noncontroversial and is fully explained in both houses. If, however, the drafter believes that including both provisions in one bill would mislead or confuse the General Assembly, or that it would undermine the Governor's veto power, then the drafter should recommend introducing the requested amendment as separate legislation, if feasible.**

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THE ATTORNEY GENERAL OF MARYLAND
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April 22, 2013

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

Re: House Bill 1292

Dear Governor O'Malley:

We have reviewed and hereby approve House Bill 1292, Calvert County - Alcoholic Beverages Licenses and Appeals. In approving the bill, we have concluded that it does not violate the single subject requirement of Maryland Constitution Article III, § 29.

As introduced, House Bill 1292 authorized issuance of a Continuing Care Retirement Community alcoholic beverages license in Calvert County. The bill was amended in the Senate to add Calvert County to the list of counties where a court may remand cases involving a petition for judicial review of an alcoholic beverages matter to the local licensing board. Both of these provisions relate to the regulation of alcoholic beverages in Calvert County.

While the link between the two could be stronger, the analysis of whether a bill has crossed the line into having two subjects depends on whether the bill implicates the purposes of the single subject requirement, which are to prevent logrolling and also to protect the Governor's veto power. *Porten Sullivan Corp. v. State*, 318 Md. 387, 403 (1990). In this case, there is no evidence of either. The added language relating to the remand of alcoholic beverages cases does not appear to have been the subject of an earlier bill, the addition of the provision was fully explained in both houses, and nothing indicates that the amendment was controversial. There were no votes against the bill in delegation, in committee, or on the floor either before or after the amendment. No one

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testified either for or against the bill or the amendment. Moreover, it is our understanding that the sponsor of the bill was consulted about the amendment and raised no objection. Given these facts, it is our view that the bill does not violate the single subject requirement.[1]

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/kmr/kk

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

[1] We also note that while the bill currently affects a single facility - Asbury Solomons - the bill will also apply to any such facilities that are created in the future. As a result, the bill is not a special law in violation of Maryland Constitution, Article III, § 33.

SINGLE-SUBJECT RULE – BUDGET RECONCILIATION AND FINANCING ACT – FUNDING MANDATE

Bill/Chapter: House Bill 102/Chapter 425 of 2013

Title: Budget Reconciliation and Financing Act of 2013

Attorney General's Letter: General Approval Letter dated May 9, 2013, footnote 2, citing advice letter (discussed below) dated March 26, 2013.

Issue: Whether a State budget reconciliation and financing bill violates the single-subject rule if it creates a funding mandate that relates to the financing of State and local government.

Synopsis: House Bill 102/Chapter 425 of 2013 is the nearly annual Budget Reconciliation and Financing Act, which aims to increase State revenues and reduce expenditures. The bill included an amendment modifying the local disparity grant formula to incorporate a minimum grant amount into the formula.

Discussion: Article III, § 29 of the Maryland Constitution requires every law enacted by the General Assembly to "embrace but one subject." Each year that it is introduced, noted the Attorney General, the subject of the Budget Reconciliation and Financing Act (BRFA) is the balancing of the budget through an increase of State revenues and reduction of expenditures.

The Attorney General concluded that because the amendment creates a funding mandate and increases State expenditures, it likely violates the single-subject rule under Article III, § 29 of the Maryland Constitution. The Attorney General conceded that, arguably, since the provision relates to the financing of State and local government, it was "not clearly unconstitutional." The Attorney General warned, however, that since the provision is a funding mandate that results in a substantial increase in expenditures, it would be "hard to defend if challenged."

Drafting Tips: **If asked to draft legislation that includes multiple subjects, or an amendment to legislation counter to the original subject, the drafter should advise the sponsor that the legislation may violate the single-subject rule of Article III, § 29 of the Maryland Constitution. In the case of a longer piece of legislation with multiple sections, the drafter should consider the overall intent of the legislation. The drafter should discuss with the sponsor whether there are alternative methods to achieve the sponsor's goals, such as introducing separate bills.**

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

May 9, 2013

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

SENATE	HOUSE
SB 47[1]	HB 102[2]
	HB 191[1]

[1] SB 47 is identical to HB 191.

[2] In HB 102, the "Budget Reconciliation and Financing Act of 2013," page 13, Education Article ("ED"), § 5-202(i)(4) would provide grants totaling approximately $2.1 million to certain counties that will experience direct education aid decreases in FY 2014. On pages 21-23, HB 102 also modifies the formula for local disparity grants that would increase State disparity grant funding by $6.4 million. This office advised during the legislative session that "because the [disparity grant] amendment creates a funding mandate and substantially increases State expenditures, it is not appropriate for inclusion in the BRFA." *See* Letter to the Honorable Norman H. Conway dated March 26, 2013, a copy of which is attached. We have consistently advised that provisions in the BRFA that have no relationship to balancing the budget may be hard to defend if challenged. Both of these severable provisions, however, could be argued are related to the financing of State and local government, and thus, in our view, are not clearly unconstitutional.

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HOUSE

HB 1372[3]

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/DF/kk

cc: The Honorable John P. McDonough
Stacy Mayer
Karl Aro

[3] HB 1372 makes numerous corrections to items in the Capital Budget Bill of 2013 (Chapter 444 of 2012) that we noted in our bill review letter on SB 151, dated May 11, 2012. Not all of the items noted, however, were included in HB 1372. The reference to "Chapter 485 of the Acts of 2009" on page 62, line 33 should be corrected in the 2014 Corrective Bill. Additionally, the corrections listed in our bill review letter on SB 151 as Miscellaneous Grant Items # 6, 19, 21, 39, and 49 also should be addressed next year in corrective legislation.

DOUGLAS F. GANSLER
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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

March 26, 2013

The Honorable Norman H. Conway
Maryland House of Delegates
121 House Office Building
Annapolis, Maryland 21401-1991

Dear Chairman Conway:

You have requested advice concerning House Bill 102, "Budget Reconciliation and Financing Act of 2013," ("BRFA"). Specifically, you ask whether an amendment to the bill relating to county disparity grants adopted by the Senate violates the single subject rule under Article III, § 29 of the Maryland Constitution. While it could be argued that the local disparity grant formula might be considered to relate to financing local government, it is my view that because the amendment creates a funding mandate and substantially increases State expenditures, it is not appropriate for inclusion in the BRFA.

House Bill 102 is the nearly annual Budget Reconciliation and Financing Act, legislation usually introduced during times of fiscal difficulty in order to assist the Governor's efforts to balance the State operating budget and provide for the financing of State and local government. The BRFA executes actions to enhance revenues and reduce future year general fund expenditures. The Senate adopted an amendment to the BRFA that modifies the local disparity grant formula to add a minimum grant amount based on local tax effort of the eligible counties and raises from 2.4% to 2.6% the local tax rate required to be eligible to receive a grant.[1] The estimated impact of the amendment in FY 2014 would be an increase in State expenditures of approximately $6.4 million.[2]

[1] This latter provision has no present legal or fiscal impact because all counties currently use an income tax rate of at least 2.6%.

[2] It is our understanding that the fiscal impact for FY 2015, depending on the actual wealth disparity between counties and any changes in income tax rates, would likely be approximately $8 million to $10 million.

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"This Office has consistently found [BRFAs] constitutional and not in violation of Art. III, § 29." Letter to the Honorable Robert L. Ehrlich, Jr. from Attorney General J. Joseph Curran, Jr. on HB 147 (the 2005 BRFA), dated May 19, 2005.[3] "In 1991, we stated that the various provisions of HB 206 were 'clearly germane to the single subject of financing State and local government.'" *Id.* In that bill review letter, however, we described the argument that because the genesis of budget reconciliation acts was to help bring the State's budget into balance during a time of fiscal crisis, funding mandates have no place in a BRFA. We stated that some mandated funding provisions might be justified if included as "legislative reactions to budget action taken by the Executive," but that a specific, unrelated funding mandate was "the hardest to defend."

This year's BRFA is not the omnibus bill so often enacted by the General Assembly in the past. The Senate amendment is a $6.4 million funding mandate unrelated to any other actions included in the 2013 BRFA. There are no other provisions in the BRFA that reduce funding for the counties, a "take," for which the amendment could be considered a "put." Thus, while the local disparity grant formula might be considered to relate to financing local government, it is my view that the amendment creating a funding mandate and increasing State expenditures should not be included in the BRFA. Indeed, this Office has previously advised that a provision increasing disparity grant spending would be inconsistent with the primary purpose of the BRFA and should be addressed in separate legislation. *See* Letter to the Honorable Thomas V. Mike Miller from Assistant Attorney General Bonnie A. Kirkland on HB 101 (the 2009 BRFA), dated April 1, 2009.[4]

I hope this is responsive to your request.

Sincerely,

Bonnie A. Kirkland
Assistant Attorney General

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[3] In that bill review letter, the Attorney General said "[w]e have not considered the issue of whether the inclusion in a BRFA of a funding mandate authorized by Art. III, § 52(11) & (12) would not be subject to Art. III, § 29 because of the provisions of Art. III, § 52(14) ("In the event of any inconsistency between any of the provisions of this section and any of the other provisions of the Constitution, the provisions of this Section shall prevail.")

[4] In that regard, I note that House Bill 914, as amended by the House Appropriations Committee, contains language identical to the Senate amendment to the BRFA that is the subject of your inquiry.

Miscellaneous Legislative Issues

EFFECTIVE REPEAL OF LAWS – SPECIFICITY REQUIREMENT

Bill/Chapter:	House Bill 777 and Senate Bill 505/Chapter 487 of 2013
Title:	Criminal Procedure – Bail Bonds – Cash Bail
Attorney General's Letter:	General Approval Letter dated April 16, 2013, footnote 12.
Issue:	Whether a bill that purports, in an uncodified section, to repeal all public general or public local laws or parts of laws that are inconsistent with the bill to the extent of the inconsistency is effective under Article III, § 29 of the Maryland Constitution.
Synopsis:	House Bill 777 and Senate Bill 505/Chapter 487 of 2013 provide that if an order setting "cash bail" or "cash bond" specifies that the bail or bond may be posted by the defendant only, the bail or bond may, except in certain circumstances, be posted by the defendant, by an individual, or by a private surety acting for the defendant that holds a certificate of authority in the State. In an uncodified section, the legislation purports to repeal all public general or public local laws or parts of these laws that are "inconsistent" with the bill's provisions "to the extent of the inconsistency."
Discussion:	Citing Article III, § 29 of the Maryland Constitution, the Attorney General concluded that the uncodified section of the legislation is ineffective. Article III, § 29 requires the legislature "in amending any article, or section of the Code of Laws of this State, to enact the same, as the said article, or section would read when amended." This provision, the Attorney General advised, requires the legislature to specifically identify the law it seeks to repeal in order for the repeal to be effective.
Drafting Tips:	**When drafting a bill that may conflict with public general or public local laws, it is ineffective under the Maryland Constitution to use general language repealing all laws, or parts of laws, that are inconsistent with the bill. To draft a bill that would effectively repeal such laws, the drafter must specifically identify the conflicting laws that the bill seeks to repeal.**

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 16, 2013

The Honorable Martin O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401

Dear Governor O'Malley:

We have reviewed the following bills and hereby approve them for constitutionality and legal sufficiency:

SENATE	HOUSE
SB 70[1]	HB 34
SB 151[2]	HB 88[4]
SB 171[3]	HB 145[5]
SB 199[4]	HB 196[3]

[1] In SB 70, there is a typographical error on page 8, line 10 in that "APPLICATION" should be "APPLICANT." We recommend this be changed in next year's corrective bill.

[2] SB 151 and HB 373 are identical bills related to reimbursement for outpatient services. Among other changes, the bills reflect the fact that the Joint Commission on Accreditation of Healthcare Organizations, a national, independent, not-for-profit organization that provides accreditation and certification for health care programs and organizations, has changed its name to the "Joint Commission." Any confusion caused by this rather generic choice of names is its fault not the legislature's.

[3] SB 171 and HB 196 are identical bills modifying the procedures for special elections. If signed, the State Board of Elections must implement the new law in such a way to ensure that overseas voters are provided with an adequate opportunity to participate in elections.

[4] SB 199 is identical to HB 88.

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SENATE	HOUSE
SB 244[5]	HB 256
SB 332[6]	HB 373[2]
SB 356[7]	HB 495[10]
SB 422[8]	HB 523[11]
SB 436[9]	HB 561[18]
SB 476[10]	HB 667[8]
SB 486[11]	HB 698[7]
SB 505[12]	HB 716[14]
SB 535	HB 775[17]
SB 581[13]	HB 777[12]
SB 617[14]	HB 1024[16]

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5 SB 244 is identical to HB 145.

6 SB 332 is identical to HB 1328.

7 SB 356 is identical to HB 698.

8 SB 422 is identical to HB 667.

9 SB 436 is identical to HB 1209.

10 SB 476 is identical to HB 495.

11 SB 486 is identical to HB 523.

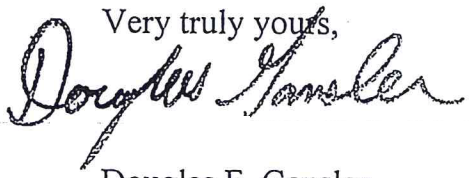
12 SB 505 and HB 777 are identical bills regarding bail bonds. The bills each twice describe bail bondsmen as holding a "certificate of authority in the State." This is inaccurate as bail bondsmen in Maryland must hold a license not a certificate. IN 10-304(a). We don't think that this minor error should interfere with the administration of the bills, but the law should be corrected in next year's corrective bill. We also note that the uncodified Section 2 of the bills, which purport to repeal "all laws or parts of laws, public general or public local" that are "inconsistent with this Act" "to the extent of the inconsistency" is ineffective. Article III, section 29 of the Maryland Constitution requires the legislature "in amending any article, or section of the Code of Laws of this State, to enact the same, as the said Article, or section would read when amended." If the legislature wishes to repeal a law, it needs to specifically identify which one.

13 SB 581 is identical to HB 1216.

14 SB 617 is identical to HB 716.

SENATE	HOUSE
SB 642[15]	HB 1209[9]
SB 674[16]	HB 1216[13]
SB 675[17]	HB 1308[15]
SB 745	HB 1328[6]
SB 748[18]	HB 1393
SB 769	HB 1408
SB 854	HB 1429
SB 930	HB 1494

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/DF/mb

cc: The Honorable John P. McDonough
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[15] SB 642 and HB 1308 are identical bills that eliminate a landlord's common law remedy of peaceful self-help in favor of judicial eviction proceedings. *See Nickens v. Mt. Vernon Realty Group*, 429 Md. 53 (2012). We note that the Court of Appeals this year is scheduled to consider the case of *State v. Goldberg* (No. 8, Sept. Term 2013), which concerns the propriety of a 2007 statute that modified a landlord's common law remedies with respect to ground rents. Under currently governing case law, however, we view the modification of the common law as proposed by SB 642/HB 1308 as a valid exercise of the legislature's constitutional powers.

[16] SB 674 is identical to HB 1024.

[17] SB 675 is identical to HB 775.

[18] SB 748 is identical to HB 561.

INTERPRETIVE ISSUES – UNDEFINED TERMS

Bill/Chapter: Senate Bill 624/Chapter 300 and House Bill 942/Chapter 301 of 2013

Title: Identity Fraud – Health Information and Health Care Records

Attorney General's Letter: April 30, 2013

Issue: Whether a bill is rendered facially invalid for vagueness if it uses the terms "health care carrier" and "health care clearinghouse," which are not defined in the bill or elsewhere in State law.

Synopsis: Senate Bill 624/Chapter 300 and House Bill 942/Chapter 301 of 2013 expand Maryland's identity fraud statute to cover health information, health care records, and unique biometric data such as fingerprints and voice prints. The bills define "health information" as information that is created or received by certain entities, including a "health care carrier" or a "health care clearinghouse," which are not defined.

Discussion: To determine the possible meaning of the undefined terms, the Attorney General considered the bills' legislative history. Both terms appear in the definition of "health information," which was added to the bills by identical committee amendments in both houses. The floor report for the Judicial Proceedings Committee explained that this definition was meant to conform the bills to language used in the federal Health Insurance Portability and Accountability Act of 1996. While the term "health care clearinghouse" is used and defined in federal law, however, the term "health care carrier" is not. Federal law instead uses the term "health plan carrier." The Attorney General suggested that the bills' drafter may have substituted "health *care* carrier" for "health *plan* carrier," because "health plan" does not have the same meaning in State law as in federal law.

The Attorney General concluded that the ambiguity surrounding the definitions of "health care clearinghouse" and "health care carrier" did not affect the facial validity of the bills, because the terms' meaning could be inferred from federal law. The law might still be rendered vague when applied in specific cases, however. Therefore, the Attorney General recommended that the language be clarified during the next session.

Drafting Tips: **When drafting legislation, a drafter should strive to use clear, unambiguous terminology. If a particular word or phrase is intended to carry the same meaning as it carries in federal law or elsewhere in State law, a drafter should make this clear in the bill's definitions section. To avoid confusion, a drafter should not create a new term to identify subject matter already covered by a different term in another part of the Code.**

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THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 30, 2013

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

Re: House Bills 942 and 1396 and Senate Bill 624

Dear Governor O'Malley:

We have reviewed and hereby approve House Bill 942 and Senate Bill 624, identical bills entitled "Identity Fraud - Health Information and Health Care Records" for constitutionality and legal sufficiency. In doing so we have concluded that the title to the bill meets the requirements of Maryland Constitution Article III, § 29. We write to discuss an interpretive issue with the bills. We also write to discuss the interaction between the bills and House Bill 1396, "Criminal Law - Theft-Related Crimes - Penalties" which we also hereby approve for constitutionality and legal sufficiency.

House Bill 942 and Senate Bill 624 amend Criminal Law Article § 8-301, which relates to identity theft, to add health care identification numbers, medical identification numbers, unique biometric data (including fingerprint, voice print, retina or iris image or other unique physical representation), and digital signatures to the "personal identifying information" protected by the law, to add access to medical information or medical care to the intents covered by the law, and to add the cost of clearing the victim's record or history related to health information or health care to the amounts for which restitution may be ordered.

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The only information referenced by the short title to House Bill 942 and Senate Bill 624 is "health information and health care records." Every portion of the title that mentions the expansion of the identity theft law also contains this reference. The bill, however, also expands the section to cover "biometric data, including fingerprint, voice print, retina or iris image or other unique physical representation, and digital signature," which are not ordinarily considered health information or health care records. Nevertheless, it is our view that this additional expansion is included in the title, which states that the bill alters a definition, and is "generally relating to identity fraud." Thus, we conclude that the title satisfies the constitutional requirement.

House Bill 1396 makes changes in the penalties for various theft-related crimes. As relevant to House Bill 942 and Senate Bill 624, it amends Criminal Law ("CL") Article, § 8-301(g), which currently imposes a fine of up to $25,000 and imprisonment of up to 15 years for an act of identity theft where the "benefit, credit, good, service, or other thing of value" is at least $500, to impose a fine of up to $10,000 and up to 10 years imprisonment where the value is at least $1,000 but less than $10,000, a fine of up to $15,000 and imprisonment of up to 15 years if the value is at least $10,000 but less than $100,000, and a fine of up to $25,000 and imprisonment of up to 25 years if the value is $100,000 or more. It also increases the value under which the offense is a misdemeanor rather than a felony from $500 to $1,000 and lowers the potential fine from $5,000 to $500, while retaining the potential period of imprisonment at 18 months.

There is no direct conflict between House Bill 942 and Senate Bill 624 and House Bill 1396. While the bills make different amendments to CL § 8-301(g)(1) and (2), the changes can easily be incorporated together. Moreover, while new CL § 8-301(g)(1)(ii) and (iii) in House Bill 1396 do not include the reference to health care information or health care that have been amended into CL § 8-301(g)(2) and what is now CL § 8-301(f)(1)(i), it is our view that, when read with the remainder of the law, the "other thing of value" language can be read to include both health care information and health care until such time as this omission can be corrected.

Finally, the definition of "health information" in House Bill 942 and Senate Bill 624 provides that it is "created or received by" certain entities. Among these are a "health care carrier" and a "health care clearinghouse." Neither term is defined in the bill. The definitions of "health care" and "health information" were added by identical committee amendments on each side. The Floor Report for the Judicial Proceedings Committee states that the amendment in question "alters the definition of 'health care' and 'health information' to conform with the definitions under the federal Health Insurance Portability and Accountability Act of 1996." This explanation provides a definition of the term "health care clearinghouse," which does not otherwise appear in State law. *See* 42 U.S.C. § 1320d(2)[1] and 45 C.F.R. § 160.103.[2] The term "health care carrier," however, is not used in the federal law, which uses the term "health plan." Nor is the term "health care carrier" one that is used in the Code, in any regulation in COMAR, or in any Maryland case. And the term "carrier" itself has different meanings in different parts of the Insurance Article. *See e.g.*, Insurance Article, §§ 15-1009(a),[3] 15-10A-01(c),[4] and 15-1201(c).[5] It is possible that this substitution was made because "health plan" does

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[1] The term "health care clearinghouse" means a public or private entity that processes or facilitates the processing of nonstandard data elements of health information into standard data elements.

[2] *Health care clearinghouse* means a public or private entity, including a billing service, repricing company, community health management information system or community health information system, and ''value-added'' networks and switches, that does either of the following functions: (1) Processes or facilitates the processing of health information received from another entity in a nonstandard format or containing nonstandard data content into standard data elements or a standard transaction[;] (2) Receives a standard transaction from another entity and processes or facilitates the processing of health information into nonstandard format or nonstandard data content for the receiving entity.

[3] (a) In this section, "carrier" means: (1) an insurer; (2) a nonprofit health service plan; (3) a health maintenance organization; (4) a dental plan organization; or (5) any other person that provides health benefit plans subject to regulation by the State.

[4] (c) "Carrier" means a person that offers a health benefit plan and is: (1) an authorized insurer that provides health insurance in the State; (2) a nonprofit health service plan; (3) a health maintenance organization; (4) a dental plan organization; or (5) except for a managed care organization as defined in Title 15, Subtitle 1 of the Health - General Article, any other person that provides health benefit plans subject to regulation by the State.

[5] (c) "Carrier" means a person that: (1) offers health benefit plans in the State covering eligible employees of small employers; and (2) is: (i) an authorized insurer that provides health

not carry the same meaning in State law as in federal law, and that the intent was to cover the same entities as are covered by the federal law. The language used does not, however, make this clear. While this lack of clarity does not affect the facial validity of the bill, it could render the law vague as applied in specific cases. For this reason, we recommend that the language be clarified in the next session.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/KMR/kk

cc: The Honorable John P. McDonough
Stacy Mayer
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insurance in the State; (ii) a nonprofit health service plan that is licensed to operate in the State; (iii) a health maintenance organization that is licensed to operate in the State; or (iv) any other person or organization that provides health benefit plans subject to State insurance regulation.

TITLE REQUIREMENTS – PURPOSE PARAGRAPH – OVERLY NARROW DESCRIPTION

Bill/Chapter: House Bill 231 and Senate Bill 223/Chapter 207 of 2013

Title: Alcoholic Beverages – Class 7 Limited Beer Wholesaler's License

Attorney General's Letter: April 18, 2013

Issue: Whether the purpose paragraph of a bill, stating that certain provisions are repealed, is sufficient to address the subject matter of the bill that contains an expansion of those provisions.

Synopsis: House Bill 231 and Senate Bill 223/Chapter 207 of 2013 create a Class 7 limited beer wholesaler's license, which authorizes holders to sell beer at wholesale to retailers and other permit holders. The bills also alter the prohibitions on the issuance of a nonresident dealer's permit to extend the prohibition to all persons with interest in a wholesaler. The title of the bills, however, reflects that the bills are "repealing certain prohibitions," rather than extending them.

Discussion: The Attorney General began by noting that House Bill 231 and Senate Bill 223 create a Class 7 limited beer wholesaler's license, which authorizes holders to sell beer at wholesale to retailers and other permit holders. Similar to other alcohol licenses, the bills also create a parallel nonresident brewery permit for an out-of-state brewery that otherwise meets the qualifications for a Class 7 license. In doing so, the bills alter the prohibitions on the issuance of a nonresident dealer's permit to extend the prohibition to all persons with interest in a wholesaler. The bills remove the exemption for certain wholesalers, prohibiting *all* wholesalers from license eligibility.

The purpose paragraphs of House Bill 231 and Senate Bill 223 state that the bills are "repealing certain prohibitions against issuing a nonresident dealer's permit to a certain person." The Attorney General noted, however, that, rather than repealing certain prohibitions, the body of the bills expands the prohibitions to apply not only to some wholesalers but to all wholesalers. Article III, § 29 of the Maryland Constitution states that "every law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title; …nor shall any Law be construed by reason of its title, to grant powers, or confer rights which are not expressly contained in the body of the Act." The Attorney General concluded that the subject of the bills is not adequately described in the bills' titles. Moreover, the Attorney General noted that in this instance,

the "generally relating to Class 7 beer wholesaler's licenses" clause is not sufficiently broad to address the discrepancy because the provision in question relates instead to nonresident dealer's permits. The Attorney General did not recommend that the bills be vetoed, but instead addressed in next year's curative bill.

Drafting Tips: **Article III § 29 of the Maryland Constitution requires the subject of every bill to be addressed in the title. The title must put a reader on notice as to the contents of the bill. Therefore, the drafter should take great care to ensure that each element of the bill is covered by the purpose paragraph of the title. Moreover, the language used should include the appropriate verb choice to reflect the substance in the body of the bill. While the "generally relating to" clause can help to broaden the scope of a title, it should not be relied on as an alternative to title specificity.**

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THE ATTORNEY GENERAL OF MARYLAND

OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

April 18, 2013

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

Re: House Bill 231 and Senate Bill 223

Dear Governor O'Malley:

We have reviewed House Bill 231 and Senate Bill 223, identical bills entitled "Alcoholic Beverages - Class 7 Limited Beer Wholesaler's License," for constitutionality and legal sufficiency. While we approve the bills, we write to point out two severable portions of the bills that cannot be given effect as they are not reflected in the bills' title. This problem can be addressed in next year's curative bill.

House Bill 231 and Senate Bill 223 create a Class 7 limited beer wholesaler's license that can be issued to the holder of a Class 5 manufacturer's license or a Class 7 micro-brewery license to allow them to sell their own beer at wholesale to retailers and permit holders from its own location or locations. The bills create a parallel nonresident brewery permit for an out-of-state brewery that meets the qualifications for a Class 7 limited beer wholesaler's license and does not hold a nonresident dealer's permit. The bills also alter the prohibitions in Article 2B, § 2-101(i) on the issuance of a nonresident dealer's permit as follows:

(2) A nonresident dealer's permit may not be issued to a person who:

(i) Holds a wholesaler or retailer license of any class issued under this article;

(ii) Has an interest in a wholesaler licensed under this article[, other than a disclosed legal, equity, or security interest of a malt beverage wholesaler]; or

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(iii) Has an interest in a retailer licensed under this article.

The effect of this change is to extend the prohibition on the issuance of a nonresident dealer's permit to all persons with an interest in a wholesaler licensed under the article, including those with "a disclosed legal, equity, or security interest of a malt beverage wholesaler." The title, however, reflects that the bill is "repealing certain prohibitions against issuing a nonresident dealer's permit to a certain person," rather than expanding them. The bill makes a parallel change to the limitations on the issuance of a resident dealer's permit in Article 2B, § 2-101(w)(3) that is not mentioned in the title at all. While oversights of this type can often be resolved by looking to the "generally relating clause," the one in these bills' title reflects only that it is "generally relating to Class 7 beer wholesaler's licenses," which is not sufficiently broad to reach the provisions in question, which relate instead to nonresident and resident dealer's permits.

Because they are not correctly described in the title, to the extent that they are mentioned at all, it is our view that these provisions may not be given effect. It is further our view, however, that the provisions are not so crucial to the major purpose of the bills – to create the Class 7 limited beer wholesaler's license and nonresident brewery permits – that they cannot be severed.[1] Therefore, we do not recommend that the bills be vetoed, but instead recommend that the matter be addressed in the next curative bill.

Very truly yours,

Douglas F. Gansler
Attorney General

DFG/kmr/kk

cc: The Honorable John P. McDonough
Stacy Mayer
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[1] We also note that a person seeking a nonresident brewery permit would have to give up a nonresident dealer's permit that they have to qualify for that permit.