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April 9, 2007

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

Re: Senate Bill 543 and House Bill 1336

Dear Governor:

We have reviewed and hereby approve the constitutionality and legal sufficiency of Senate Bill 543 and House Bill 1336, which provide authority for and direction to the Board of Trustees for the State Retirement and Pension System to divest from investment in the Republic of Sudan. The divestment scheme of House Bill 1336 and its companion Senate Bill 543 grant the Trustees discretion whether to divest investments in companies doing business in Sudan when certain conditions are present. In our view, Senate Bill 543 and House Bill 1336 are constitutional and not preempted by federal law.

These bills enact the 2007 Darfur Protection Act. Nothing in the Act conflicts with federal law regarding Sudan; thus, it is not preempted. Current federal authorities regarding Sudan are summarized in *National Foreign Trade Council v. Giannoulis* (E.D. Ill., Feb. 23, 2007). These include Executive Order No. 13067 (62 Fed. Reg. 59989), the Trade Sanctions Reform and Export Enhancement Act, 22 U.S.C. § 7201 et al., the Sudan Peace Act, 50 U.S.C. § 1701, the Comprehensive Peace in Sudan Act, Pub. L. No. 108-497 (amending the Sudan Peace Act, 50 U.S.C. § 1701), and the Darfur Peace and Accountability Act, Pub. L. No. 109-344 (amending the Comprehensive Peace in Sudan Act, 50 U.S.C. § 1701).

While federal law “expressly restricts how companies can and cannot do business in Sudan, it is silent regarding divestment of holdings connected with Sudan.”

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Giannoulis, Slip Op. at 17. In *Giannoulis*, the federal court determined that certain provisions of the Illinois Sudan Act regarding the deposit of state monies were preempted by federal law. But the court went on to note that the amendments to the Illinois Pension Code regarding divestment were not unconstitutional interference with the federal government's power to conduct foreign affairs.

Similarly, Maryland's Darfur Protection Act will have no more than an incidental or indirect effect in Sudan, thus it does not violate the Foreign Affairs Power of the federal government to conduct foreign relations. The Act expressly provides that if the President of the United States rescinds Executive Order 13067, the Act is abrogated. Moreover, we believe the Act does not violate the Foreign Commerce Clause because the State is acting as a market participant rather than a regulatory authority with regard to the pension it funds and administers, even though the exemption has not yet been applied to the Foreign Commerce Clause. "Since state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants, evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *College Sav. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 685, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999).

Sincerely,

/s/

Douglas F. Gansler
Attorney General

DFG/SBB/as